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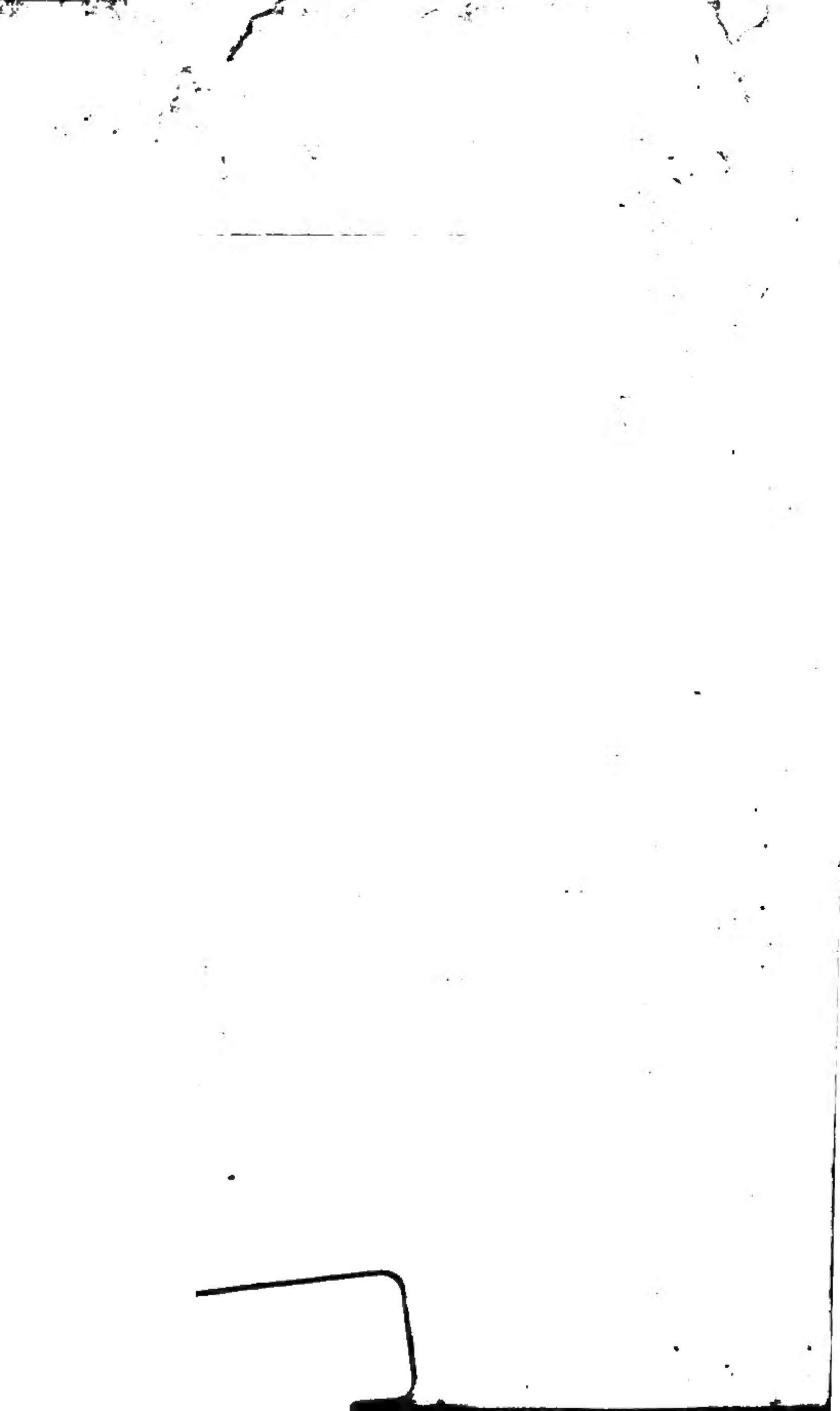
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A
PRACTICAL TREATISE
OF
THE LAW
OF
VENDORS AND PURCHASERS
OF
ESTATES.

—
By SIR EDWARD SUGDEN.
—

BONÆ FIDEI VENDITOREM, NEC COMMODORUM SPEM AUGERE, NEC
INCOMMODORUM COGNITIONEM OBSCURARE OPORTET.

Valerius Maximus, l. vii. c. 11.

FROM THE NINTH LONDON EDITION.

WITH NOTES AND REFERENCES TO AMERICAN DECISIONS.

IN TWO VOLUMES.

VOL. I.

BROOKFIELD, MASS.

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THE recent Decisions have been introduced into their proper places ; and references have been made to all the Reports of the modern Cases, as few have on their shelves all the contemporaneous Reporters. The language of the Law has been altered by the Real Property Acts, and the text of this work has accordingly throughout required alteration. No apology is necessary for introducing a view of those Acts in the Chapter upon TITLE, as it is of deep importance that their contents should be readily accessible. To prevent the too frequent recurrence of new Editions, the Writer has been induced to add upon this occasion considerably to the usual number of copies ; and as that will deprive him of an early opportunity of again correcting the Work, he has revised it, with a view to this Edition, with all the care and attention which his opportunities have permitted.

LINCOLN'S INN,

17th May, 1834.

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THE LAW
OF
VENDORS AND PURCHASERS
OF
ESTATES.

INTRODUCTION.

MORAL writers insist (a), that a vendor is bound, *in foro conscientiae*, to acquaint a purchaser with the defects of the subject of the contract. Arguments of some force have, however, been advanced in favor of the contrary doctrine ; and our law does not entirely coincide with this strict precept of morality(b).

If a person enter into a contract, with full knowledge of all the defects in the estate, the question cannot arise : *scientia enim utrinque par pares facit contrahentes*(c).

So if, at the time of the contract, the vendor himself was not aware of any defect in the estate, it seems that the purchaser must take the estate with all its faults, and cannot claim any compensation for them.

(a) Cic. de Off. 3. 13 ; Grotius de Jure Belli ac Pacis, l. 2. c. 12. s. 9 ; Puffendorf de Jure Naturæ et Gentium, l. 5. c. 3. s. 2 ; Puffendorf de Off. 1. 1. c. 15. s. 3 ; Valerius Maximus, l. 8. c. 11 ; et vide Deuteronomy xxv. 14 ; Paley's Moral Philosophy, vol. 1. b. 3. ch. 7.

(b) *Vide Infra*, ch. 6.

(c) Grotius de Jure Belli ac Pacis, l. 2. c. 12. s. 9. 3 ; Puffendorf de Jure Naturæ et Gentium, l. 5. c. 3. s. 5.

And even if the purchaser was, at the time of the contract, ignorant of the defects, and the vendor was acquainted with them, and did not disclose them to the purchaser; yet, if they were *patent*, and could have been discovered by a vigilant man, no relief will be granted against the vendor.

The disclosure of even *patent* defects in the subject of a contract, may be allowed to be a moral duty; but it is what the civilians term a duty of imperfect obligation. *Vigilantibus, non dormientibus jura subveniunt*, is an ancient maxim of our law, and forms an insurmountable barrier against the claims of an improvident purchaser.

In this respect, equity follows the law. But it has been decided, that if a vendor during the treaty, industriously prevent the purchaser from seeing a defect which might otherwise have easily been discovered, he is not entitled to the extraordinary aid of a court of equity: and it is conceived, that he could not even sustain an action against a purchaser for a breach of the contract.

And if the vendor know that there is a *latent* defect in his estate, which the purchaser could not, by any attention whatever, possibly discover, it is not clear that he is not bound to disclose his knowledge, although the estate be sold, expressly subject to all its faults(*d*).

By the civil law, vendors were bound to warrant both the title and estate against all defects, whether they were or were not conusant of them. To prevent the inconveniences which would have inevitably resulted from this general doctrine, it was qualified by holding, that if the defects of the subject of the contract were evident, or the buyer might have known them by proper precaution, he could not obtain any relief against the vendor.

The rule of the civil law also was, "*simplex commendatio non obligat*." If the seller merely made use of those

(*d*) See *post*. ch. 6. s. 2.

expressions, which are usual to sellers, who praise at random the goods which they are desirous to sell, the buyer, who ought not to have relied upon such vague expressions, could not, upon this pretext, procure the sale to be dissolved(*e*).

The same rule prevails in our law(*f*), and has received a very lax construction in favor of vendors. It has been decided, that no relief lies against a vendor for having falsely affirmed, that a person bid a particular sum for the estate, although the vendee was thereby induced to purchase it, and was deceived in the value(*g*).

Neither can a purchaser obtain any relief against a vendor for false affirmation of value(*h*); it being deemed the purchaser's own folly to credit a nude assertion of that nature. Besides, value consists in judgment and estimation, in which many men differ. So, where a church lease was described in the particulars of sale, as being nearly of equal value with a freehold, and renewable every ten years, upon payment of a *small fine*, the purchaser was not allowed any abatement in his purchase-money, although the fine was very considerable, and it was proved that the steward of the estate had remonstrated with the vendor, before the sale, upon his false description(*i*). And a statement in the particulars of an advowson, that an avoidance of the preferment was likely to occur soon, was held to be so vague and indefinite, that the Court could not take notice of it judicially; and

(*e*) 1 Dom. 85.

(*f*) Chandelor v. Lopus, Cro. Jac. 4.

(*g*) 1 Roll. Abr. 101. pl. 16. See 1 Sid. 146; *Kinnaird v. Lord Dean*, stated *infra*, n.; *Dawes v. King*, 1 Stark. 75.

(*h*) *Harvey v. Young*, Yelv. 20. See *Duckenfield v. Whichcott*, 2 Cha. Ca. 204; see *Ekins v. Tresham*, 1 Lev. 102; reported 1 Sid. 146, by the name of *Leakins v. Clissel*.

(*i*) *Brown v. Fenton*, Rolls, 23 June 1807, MS.; S. C. 14 Ves. jun. 144.

that its only effect ought to have been, to put the purchaser upon making inquiries respecting the circumstances under which the alleged avoidance was likely to take place, previous to his becoming the purchaser(*k*). So a statement, that the property is uncommonly rich water meadow land, will not annul the contract, although the land is imperfectly watered(*l*).

But if a vendor affirm, that the estate was valued by persons of judgment, at a greater price than it actually was, and the purchaser act upon such misrepresentation, the vendor cannot compel the execution of the contract in equity(*m*), nor would he, it should seem, be permitted to maintain an action at law for non-performance of the agreement.

And a remedy will lie against a vendor, for falsely affirming that a greater rent is paid for the estate than is actually reserved(*n*)(*I*); because that is a circumstance within his own knowledge. The purchaser is not bound

(*k*) *Trower v. Newcome*, 3 Mer. 704.

(*l*) *Scott v. Hanson*, 1 Sim. 13.

(*m*) *Buxton v. Cooper*, 3 Atk. 383; S. C. MS.; see *Partridge v. Usborne*, 5 Russ. 195; *Small v. Attwood*, 1 You. Rep. 407, now in D. P. upon appeal.

(*n*) *Eikins v. Tresham*, *ubi sup.*; *Lysney v. Selby*, 2 Lord Raym. 1118; 1 Salk. 211, S. C. nom. *Risney v. Selby*; *Dobell v. Stevens*, 3 Barn. & Cress. 623; *Small v. Attwood*, 1 You. Rep. 407.

(*I*) In the 1st vol. of Coll. of Decis. p. 332, the following case is reported:—An heritor having solemnly affirmed to his tacksman at setting the lands, that there was paid, by the preceding tenants, for each acre, a great deal more than really was paid, and thereby induced him to take it at a very exorbitant rate, whereby he was leased *ultra dimidium*; yet continued to possess two years before he complained. The Lords found the allegiance of circumvention and fraud, both in *consilio* and in *eventu*, not sufficient to reduce the tack, and that the tenant should have informed himself better what was the true rent, and not have relied on the setter's assertion, and ought to have tried the quality of the ground, and, his eye being his merchant, he had none to blame but himself, especially now that he had acquiesced two years. *Kinnaird v. Lord Dean*.

to inquire further : for the leases may be made by parol, and the tenants may refuse to inform the purchaser what rent they pay ; or the tenants may combine with the landlord, under whose power they frequently are, and so misinform and cheat the purchaser. It has been decided also, after great consideration(*o*), that a purchaser may recover against a vendor for false affirmation of rent, although he did not depend upon the statement, but inquired what the estate let for. Where it can be satisfactorily proved, that the purchaser did not rely upon the vendor's assertion, a jury would undoubtedly give but trifling damages.

It seems that the same remedy will lie against a person *not interested in the property*, for making a false representation to a purchaser of value or rent, as might be resorted to in case such person were owner of the estate(*p*) ; but the statement must be made *fraudulently*, that is, with an intention to deceive ; whether it be to favor the owner, or from an expectation of advantage to the party himself, or from ill-will towards the other, or from mere wantonness, appears to be immaterial(*q*).

And in cases of this nature it will be sufficient proof of fraud to show, first, that the fact, as represented, is false : secondly, that the person making the representation had a knowledge of a fact contrary to it. The injured party cannot dive into the secret recesses of the other's heart, so as to know whether he did or did not recollect the fact ; and therefore, it is no excuse in the party, who made the representation, to say, that though he had received in-

(*o*) *Lysney v. Selby*, *ubi sup.*

(*p*) *Pasley v. Freeman*, 3 Term Rep. 51 ; *Eyre v. Dunsford*, 1 East, 318 ; *Ex parte Carr*, 3 Ves. & Bea. 108.

(*q*) *Haycraft v. Creasy*, 2 East, 92 ; *Tapp v. Lee*, 3 Bos. & Pull. 367 ; and see 6 Ves. jun. 186 ; 13 Ves. jun. 134 ; 12 East, 634, n. ; *Hutchinson v. Bell*, 1 Taunt. 558 ; *De Graves v. Smith*, 2 Camp. Ca. 533 ; *Foster v. Charles*, 7 Bing. 106 ; S. C. 4 Moo. & P. 61 and 741 ; *Corbett v. Brown*, 2 Mood. & Malk. 108 ; S. C. 5 Carr. & P. 363.

formation of the fact, he did not at that time recollect it(*r*).

A *purchaser* is not liable to an action of deceit for misrepresenting the seller's chance of sale, or the probability of his getting a better price for his commodity than the price which such proposed buyer offers(*s*). Nor is a purchaser bound to acquaint the vendor with any *latent* advantage in the estate: for instance, if a purchaser has discovered that there is a mine under the estate, he is not bound to disclose that circumstance to the vendor, although he knows the vendor is ignorant of it(*t*). Equity will not, however, interfere in favor of a purchaser who has misrepresented the estate to any person who had a desire of purchasing it(*u*).

And a very little is sufficient to affect the application of this principle. If, it has been said, a word, a single word be dropped which tends to mislead the vendor, that principle will not be allowed to operate(*x*).

And if a purchaser conceal the fact of the death of a person of which the other is ignorant, and by which the value of the property is increased, equity will set aside the contract(*y*).

The same rules apply to incumbrances and defects in the title to an estate, as to defects in the estate itself. Both law and equity require the vendor to deliver to the purchaser the instrument by which the incumbrances were created, or on which the defects arise; or to acquaint him with the facts, if they do not appear on the title-deeds. If a vendor neglect this, he is guilty of a

(*r*) *Burrowes v. Lock*, 10 Ves. jun. 470, per Sir Wm. Grant.

(*s*) See *Vernon v. Keys*, 12 East, 632.

(*t*) See 2 Bro. C. C. 420.

(*u*) See *Howard v. Hopkyns*, 2 Atk. 371; *Young v. Clerk*, Prec. Cha. 538.

(*x*) *Per Lord Eldon*, 1 Jac. 178.

(*y*) *Turner v. Harvey*, 1 Jac. 169.

direct fraud, which the purchaser, however vigilant, has no means of discovering: and Lord Hardwicke laid it down(z), “that even if an attorney of a vendor of an estate, knowing of incumbrances thereon, treat for his client in the sale thereof, without disclosing them to the purchaser or contractor, knowing him a stranger thereto, but represents it so as to induce a buyer to trust his money upon it, a remedy lies against him in *equity*(a): to which principle it is necessary for the court to adhere, to preserve integrity and fair dealing between man and man; most transactions being by the intervention of an attorney or solicitor.”

The same observation applies, and indeed with much greater force, to the attorney or agent of the purchaser. It can seldom happen that the attorney or agent of the purchaser is conusant of any incumbrance on the estate intended to be purchased, unless he be employed by both parties; which the same person frequently is, in order to save expense. This practice has been discountenanced by the courts(b), and is often productive of the most serious consequences; for it not rarely happens, that there are incumbrances on an estate which can be sustained in equity only, and which will not bind a purchaser who obtains the legal estate, unless he had notice of them previously to completing his purchase. Now notice(c) to an agent, although one concerned for both parties, is treated in equity as notice to the purchaser himself; and, therefore, if the attorney know of any equitable incumbrance, the purchaser will be bound by it, although he himself was not aware of its existence.

(z) *Per* Lord Hardwicke, 1 Ves. 96; and see 6 Ves. jun. 193; *Burrowes v. Lock*, 10 Ves. jun. 470; and *Bowles v. Stewart*, 1 Sch. and Lef. 227.

(a) It seems clear that relief might now be obtained at law.

(b) See 6 Ves. jun. 631, n.

(c) See *infra*, ch. 17.

And by these means, a purchaser may even deprive himself of the benefit to be derived from the estate lying in a register county: the register may be searched, and no incumbrance appear; yet, if the attorney have notice of any unregistered incumbrance, equity will assist the incumbrancer in establishing his demand against the purchaser(*d*).

Another powerful reason why a purchaser should not employ the vendor's attorney is, that if the vendor be guilty of a fraud in the sale of the estate, to which the attorney is privy, the purchaser, although it be proved that he was innocent, will be responsible for the misconduct of his agent(*e*). In one case(*f*), a purchaser lost an estate, for which he gave nearly 8,000*l.*, merely by employing the vendor's attorney, who was privy to a fraudulent disposition of the purchase money.

But it has been decided that the grantor of an annuity is not bound to lay open to the intended grantee all the circumstances of his situation: he is only bound to give honest answers to questions put to him by the intended grantee. If the grantee employ the grantor's attorney to prepare the deeds, the mere preparation of the deeds does not place him in a confidential relation towards the grantee; and as the agent of the grantor stands in his situation, he is not bound to do more than his principal(*g*).

With the exception of a vendor, or his agent, suppressing an incumbrance, or a defect in the title, it seems clear, that a purchaser cannot obtain relief against a vendor for any incumbrance, or defect in the title, to which his covenants do not extend; and therefore if a pur-

(*d*) See *infra*, ch. 16, 17.

(*e*) See *Bowles v. Stewart*, 1 Sch. & Lef. 227.

(*f*) *Doe v. Martin*, 4 Term Rep. 39: *Hicks v. Morant*, 3 You. & Jerv. 286; 2 Dow & Clark. 414.

(*g*) *Adamson v. Evitt*, 2 Russ. & Myl. 66.

chaser neglect to have the title investigated, or his counsel overlook any defect in it, it appears to be without a remedy(*h*).

To sum up the foregoing observations,—a purchaser is entitled to relief, on account of any *latent* defects in the estate, or in the title to the estate, which were not disclosed to him, and of which the vendor, or his agent, was aware. In addition to this protection afforded him by the law, a provident purchaser will examine and ascertain the quality and value of the estate, and not trust to the description and representation of the vendor or his agents; he will employ an agent and attorney not concerned for the vendor, and will have the title to the estate inspected by counsel(*I*).

Where it is stated upon a sale, even by auction, that the estate is in lease, and there is no *misrepresentation*, the purchaser will not be entitled to any compensation, although there are covenants in the lease contrary to the custom of the country; because, whoever buys with notice of a lease, is held *conusant* of all its contents(*i*). This rule, it should seem, ought, as between a vendor and purchaser, to have been confined to a contract actually executed by the conveyance of the estate and payment of the purchase-money; but as the point has been thus decided, no person having

(*h*) See *post*, ch. 9.

(*i*) *Hall v. Smith*, Rolls, 18 Dec. 1807, MS.; S. C. 14 Ves. jun. 426; *Walter v. Maunde*, 1 Jac. & Walk. 181; *Barraud v. Archer*, 2 Sim. 437.

(*I*) This can seldom be effectually done, unless the abstract be carefully compared with the title-deeds: in doing which, the attention should be particularly directed to the descriptions of the parties, the recitals, the parcels, and the covenants for quiet enjoyment, free from incumbrances; which frequently lead to incumbrances and facts which have been suppressed. This should be particularly attended to, as a purchaser is bound by every deed or fact, to which an instrument in his possession leads, by recital or description. See *post*, ch. 16.

notice of any lease, or that the estate is in the occupation of tenants, should sign a contract for purchase of the estate without first seeing the leases, unless the vendor will stipulate that they contain such covenants only as are justified by the custom of the country.

With respect to incumbrances, it remains to remark, that if a purchaser suspect any person has a claim on the estate which he has contracted to buy, he should inquire the fact of him, *at the same time stating that he intends to purchase the estate*; and if the person of whom the inquiry is made has an incumbrance on the estate, and deny it, equity would not afterwards permit him to enforce his demand against the purchaser(*j*).

The inquiry should be made before proper witnesses; and as a witness may refresh his memory by looking at any paper if he can afterwards swear to the facts from his own memory, it seems advisable that the witnesses should take a note of what passes(*k*).

Where difficulties arise in making out a good title, the purchaser should not take possession of the estate until every obstacle is removed. Purchasers frequently take this step, under an impression, that it gives them an advantage over the vendor; but this is a false notion; such a measure would, in many cases, be deemed an acceptance of the title(*l*), or would at least be a ground to leave it to a jury, to consider whether the party had not taken possession with an intention to wave all objections. Where a purchaser, after delivery to him of the abstract, which disclosed a reservation of a right of sporting not noticed in

(*j*) *Ibbetson v. Rhodes*, 2 Vern. 554; *Amy's case*, 2 Cha. Ca. 128, cited.

(*k*) See *Doe v. Perkins*, 3 Term Rep. 749, and the cases there cited; *Burrough v. Martin*, 2 Camp. 112.

(*l*) See 3 P. Wms. 193; *Calcraft v. Roebuck*, 1 Ves. jun. 226; 12 Ves. jun. 27; and *Vancouver v. Bliss*, 11 Ves. jun. 464.

the particulars by which he purchased, upon his application was let into possession, and paid the greater part of the purchase-money, without objecting to the right reserved, and apologized for not sending the draft of the conveyance, and afterwards raised the objection, he was held bound by his conduct, which was considered as a waiver of the objection; and although a clerk of the seller's solicitor wrote in answer to the purchaser's application for compensation, that a reasonable compensation would be allowed, yet this was not deemed binding, as he had no authority to make such an offer(*m*).

If, however, the objections to the title be remediable, and the purchaser be desirous to enter on the estate, he may in most cases venture to do so; provided the vendor will sign a memorandum, importing that the possession taken by the purchaser, shall not be deemed a waiver of the objections to the title, or be made a ground for compelling him to pay the purchase-money into court, in case a bill be filed, before the conveyance to him is executed. And a purchaser may, with the concurrence of the vendor, safely take possession of the estate at the time the contract is entered into, as he cannot be held to have waved objections, of which he was not aware; and if the purchase cannot be completed on account of objections to the title, he will not be bound to pay any rent for the estate, unless perhaps the occupation of it has been beneficial to him(*n*).

A purchaser of any equitable right, of which immediate possession cannot be obtained, should, previously to completing his contract, inquire of the trustee, in whom the property is vested, whether it is liable to any incumbrance. If the trustee make a false representation, equity would

(*m*) *Burnell v. Brown*, 1 Jac. & Walk. 168.

(*n*) *Hearne v. Tomlin*, Peake's Ca. 192; see *Kirtland v. Pounsett*, 2 Taunt. 145; *Stevens v. Guppy*, 3 Russ. 171.

compel him to make good the loss sustained by the purchaser, in consequence of the fraudulent statement(o). When the contract is completed, the purchaser should give notice of the sale to the trustee. The notice would certainly affect the conscience of the trustee, so as to make him liable in equity, should he convey the legal estate to any subsequent purchaser; and it would also give the purchaser a priority over any former purchaser, or incumbrancer, who had neglected the same precaution(p).

Auctioneers usually prepare the particulars and conditions of sale; but this a vendor should not permit, as continual disputes arise from the mis-statements consequent upon their ignorance of the title to the estate.

Where an estate has been in a family for a long time, or the title has not been recently investigated, it will be advisable for the owner to have an abstract of his title submitted to counsel, and any objections which occur to it cleared up, previously to a contract being entered into for sale of the estate. By this precaution, the vendor will prevent any delay on his part, which might impede the sale from being carried into effect by the time stipulated; and will, in many cases, avoid the expense necessarily attending tedious discussions of a title. Another advantage is, that if there should be any defect in the title which cannot be cured, it would be known only to the agents and counsel of the vendor. It is of the utmost importance to keep defects in a title from the knowledge of persons not concerned for the owner. It has frequently happened, that persons concerned for purchasers, have communicated fatal defects in a vendor's title, to the person interested in taking advantage of them, by which many titles have been disturbed.

(o) *Burrowes v. Lock*, 10 Ves. jun. 470.

(p) *Vide infra*, ch. 16.

CHAPTER I.

OF SALES BY AUCTION AND PRIVATE CONTRACT.

1. By three acts(*a*) of his late Majesty's reign, a duty is imposed of 7*d.* for every twenty shillings of the purchase-money, which shall arise or be payable by virtue of any sale at auction in Great Britain, of any interest in possession or reversion, in any freehold, copyhold, or leasehold lands, tenements, houses, or hereditaments.

But sales by way of auction, of estates under the decree of the Court of Chancery, or Exchequer, in England ; or of the Court of Session, or Exchequer, in Scotland(*b*), are not liable to the duty ; nor do the acts extend to auctions held on the account of the lord or lady of any manor, for granting copyhold or customary lands, for lives or years ; or to any auction held for the letting any estate for lives or years to be created by the persons on whose accounts such auctions shall be held(*c*)(*I*) : neither does the duty attach upon the purchase-money of any estate sold under a sheriff's authority, for the benefit of creditors, in execution of any judgment ; nor to the purchase-money of any bankrupt's estate, sold by order of the assignees under any commission of bankruptcy(*d*). And, lastly, no auction duty is payable in respect of monies produced

(*a*) 27 Geo. III. c. 13. s. 36 ; 37 Geo. III. c. 14 ; and 45 Geo. III. c. 30.

(*b*) 19 Geo. III. c. 56. s. 13.

(*c*) *Id.* s. 14.

(*d*) *Id.* s. 15.

(*I*) This mode of letting estates, is adopted by the City of London, and some other public bodies.

by sale of estates, sold by auction, for the redemption of land tax(e).

By an order of Lord Rosslyn's(f), it is directed, that upon application by a mortgagee of a bankrupt's estate, the mortgaged estate shall be sold before the commissioners, or by public auction, if they shall think fit. And it has been decided(g), that a sale of a mortgaged estate by auction, under this order, is liable to the auction duty, and is not within the exception in the acts of sales of bankrupts estates *by the order of the assignees*. This decision was made at *nisi prius*, and, perhaps, cannot be supported. The Legislature intended that the creditors of bankrupts should have the advantage of selling the estates by auction without being charged with the auction duty. Now this intention is, in the case under consideration, clearly subverted by the decision in *Coare v. Creed*. The argument was, that the sale was by the mortgagee, and so not part of the bankrupt's estate. But if the money produced by sale of the pledge is insufficient to cover the mortgagee's debt, he of course resorts to the general effects for a dividend on the residue. If the pledge produce more, the surplus sinks into the general fund; so that assuming, as the Legislature clearly did, that the auction duty is in substance a charge on the land, it in this case takes so much from the bankrupt's property, distributable for the benefit of his creditors. It was considered to be clear, however, that where the estate was sold by order of the assignees, with the consent of the mortgagee, no duty would be payable. But it has been decided, that a sale by assignees of an estate in fee, which was in mortgage for a term of years, was liable to the auction duty, because the assignees sold the whole

(e) 42 Geo. III. c. 116. s. 113.

(f) 4 Bro. C. C. at the end.

(g) *Coare v. Creed*, 2 Esp. Ca. 699.

estate, and they had only the equity of redemption(*h*). But the act of Parliament draws no such distinction. Most bankrupts estates are in mortgage; and the exception would indeed be illusory, if it only extended to estates upon which there was no incumbrance. The simple question, however, is, whether such a sale is not a *bona fide* sale by order of the assignees? It seems, indeed, to have been considered, that the mortgagee had the property, and the bankrupt had only the equity of redemption. But, even at law, the bankrupt had the fee-simple in reversion expectant upon the term of years in the mortgage, and in equity he was owner of the fee in possession, subject to the debt. The case of the King *v.* Abbott went far beyond the case of Coare *v.* Creed. To avoid the effect of these decisions, assignees must, in future, sell the estate *subject to the mortgage*. The purchaser must, of course, pay off the mortgage; and therefore, by the insertion of a few words in the particulars, the creditors may obtain the relief which the Legislature intended to grant them.

The words of the late act(*i*) are, that "all sales of any real or personal estate of any bankrupt or bankrupts shall not be liable to any auction duty," which may probably remove all difficulty upon this point. Since these observations were published, the point came before the Court of Exchequer upon a sale by auction, by assignees, of the absolute interest in fee of an estate of the bankrupt in mortgage; and it was held, that the duty was not payable(*j*). Upon a writ of error in the Exchequer Chamber the judges were divided in opinion, and the judgment below was affirmed, in order that the question

(*h*) Rex *v.* Abbott, Excheq. Mich. T. 1816, MS.; 3 Price, 178.

(*i*) 6 Geo. IV. c. 16. s. 98.

(*j*) Rex *v.* Winstanley, 3 You. & Jerv. 124. 2 Dow & Clark, 302.

might be disposed of in the House of Lords(*k*), and there the judgment has been affirmed(*l*). Two questions were put to the judges: 1st. whether, when a trader, having real estates under mortgage, becomes a bankrupt, and the whole interests in the estates are sold, by order of the assignees, for the benefit of the creditors, and no concurrence on the part of the mortgagees appears, the auction duty is payable on the whole of the sum received for the estates, or on any and what part of it: 2dly. Whether, when a trader, having estates in mortgage, afterwards conveys the estates to trustees, and then becomes bankrupt, and the whole interest in the estates are sold by the assignees, with the concurrence of the trustees, it not appearing that the mortgagees were consulted, the auction duty is payable on the whole or any part of the sum received for the estates.

Mr. Justice Bayley delivered the unanimous opinion of the judges, in answer to both questions, that the auction duty was not payable on the whole or any part of the sum; observing, that if this had been a sale by the mortgagee, the matter might have stood on a different footing. Lord Wynford observed that he was in the court below when this case was decided there, and he differed in opinion from the rest of the judges. He was happy to say, however, that, upon fuller consideration, he was convinced that they were right and he was wrong. His puzzle was about the word *estate*, and whether the estate in question, being in mortgage, could be considered as the estate of the bankrupt. But he was now satisfied that, speaking in ordinary language, this is the estate of the bankrupt, clogged with the debt of the creditor. The mortgage is merely a security, and every other in-

(*k*) 3 You. & Jerv. 126.

(*l*) 2 Crompt. & Jerv. 434; 2 Dow & Clark, 302.

terest is in the bankrupt; and therefore, upon a sale of the estate by the commissioners or assignees, the sale is exempt, under these acts of Parliament, from payment of the auction duty. Suppose the bankrupt's funds should not be sufficient to pay the creditors, after paying off the mortgage, the loss must fall on the bankrupt's funds. Suppose the whole subject should be swallowed up by the mortgage, the mortgagee might say that he derived no advantage from the sale beyond the mere payment of his debt. Suppose a third case; that the funds, after payment of the mortgagee and the rest of the creditors, should afford some small surplus for the unfortunate bankrupt, yet the sale being a forced sale, came in principle within the exemption under these acts. He had his doubts as to the soundness of the present judgment, looking to the decision in the case of the King and Abbott; but he was now satisfied that the judgment ought to be affirmed. Lord Tenterden observed that he entirely agreed in the opinion of the Judges. There was some difference in the language of the different acts relating to this subject, which occasioned some doubts; but the words of the statute of 19 Geo. 3. c. 56. s. 15. are, "that nothing therein contained shall extend to charge with auction duty *any estate or effects* of bankrupts sold by order of the assignees under a commission of bankruptcy." The words of the 43 Geo. 3. are much the same; and then came the case of the King and Abbott. Then followed the Act of the 6 Geo. 4, which enacted, "that all sales of *any real or personal estate* of any bankrupt or bankrupts shall not be liable to any auction duty;" and the question is whether the estate sold in this case was the estate of the bankrupt within the meaning of these acts. Now, when we look at the words of an act of Parliament, which are not applied to any particular science or art, we are to construe them as they

are understood in common language ; and in ordinary speech, the estate, although mortgaged, is still considered as the estate of the mortgagor, and the interest of the mortgagee as merely a security ; and, therefore, it appeared to him, that, according to the true construction of the words, this was the estate of the bankrupt within the meaning of the act. If they were to be taken in any other sense, the effect would be to diminish the bankrupt's estate applicable to the payment of the creditors, by the amount of the duty. Upon the whole, it appeared to him, that according to the intention and the words of the act of the 6 Geo. 4, no auction duty was payable on estates sold under such circumstances as the present.

The point therefore is decided against the liability to duty where even the whole estate is sold, provided the mortgagee do not join in the sale ; of course, his concurrence in the conveyance will not render the sale liable. The point is still open where the mortgagee does concur in the sale ; and therefore where the property is sufficient in value to pay off the mortgage, the sale should be by the assignees alone.

The auctioneer, agent, or seller by commission, is bound to pay the auction duty, which he may deduct out of the money he receives at the sale. If he receive none, he may recover it from the vendor by action.

But if the owner of estates sold by auction, or any other person on his behalf, buy in the same, without fraud or collusion, no auction duty will become payable^(m) ; provided notice be given in writing⁽ⁿ⁾ to the auctioneer before such bidding, signed by the owner and the person intended to be the bidder, of the latter being appointed by the former, and having agreed accordingly to bid at the sale for his use^(o) ; and provided the delivery of such

(m) 19 Geo. III. c. 56. s. 12.

(n) 28 Geo. III. c. 37. s. 20.

(o) See a form of such notice, Appendix, No. 1.

notice be verified by the oath of the auctioneer, as also the fairness of the transaction, to the best of his knowledge.

Neither will the duty be payable where the estate is bought in by, or by the order of the steward(*p*) or known agent of the owner, actually employed in the management of the sale of such estate; but notice in writing of his intention must be given by the steward or agent, if he himself bid, or by him and the bidder, if he appoint a person to bid(*q*); and the delivery of such notice must be verified in the same manner as the delivery of a notice given by the owner. And to exempt a vendor from payment of the duty, every notice must, at the time appointed by law for the auctioneer's passing his account of the sale, be produced by the auctioneer to the officer authorized to pass the account of such sale; and also be left with the officer(*r*).

It is not necessary that the sale should be a regular auction. The acts apply to every mode of sale, whereby the highest bidder is deemed to be the purchaser. Therefore, where after an auction at which there was no bidding, the seller's agent stated that he should be ready to treat for the sale by private bargain, and the meeting broke up; and the agent shortly afterwards went into a private room, with several of the persons who attended the sale, and he stated that the highest offer above 50,000*l.* would be accepted; and offers were accordingly made to him, and he having opened them, said that the one which was the highest *would be accepted, provided the terms of payment could be adjusted, and these terms having been adjusted, the bargain was concluded the following day; this*

(*p*) 42 Geo. III. c. 93. s. 1.

(*q*) See forms of such notices, Appendix, Nos. 2 and 3.

(*r*) 42 Geo. III. c. 93. s. 2.

was held to be within the act. The agent put himself under an obligation to treat with all the persons assembled, and to give the estate to the highest bidder. The question was not, whether this was what was usually called a sale by auction, but whether for the purpose of this act every thing must not be considered as such a sale where the contract was with various persons, with an engagement to let the highest bidder be the purchaser. He might have taken any individual he pleased and concluded a bargain with him ; that would have been a transaction of a different kind : but here he treated with a number, and came under an engagement to accept the highest offer(s).

Any thing in the nature of a bidding is within the acts ; and therefore where the owner put the price under a candlestick in the room (which is called a dumb bidding), and it was agreed that no bidding should avail if not equal to that, it was holden(t) to be within the acts ; as being in effect an actual bidding of so much, for the purpose of superseding smaller biddings at the auction.

Upon such a sale by candlestick biddings, as they are denominated, where the several bidders do not know what the others have offered, a bidding of so much per cent. more than any other person has offered would be binding on the person who makes it(u).

So biddings by several persons of sums marked upon a paper are within the act(v).

So in the case of a female auctioneer who continued silent during the whole time of the sale, but whenever any one bid, she gave him a glass of brandy : the sale

(s) Walker v. Advocate-General, 1 Dow, 111.

(t) See the case cited, 3 East, 340. Capp v. Topham, *infra*.

(u) 3 Mer. 483, *per* Lord Eldon.

(v) Attorney-General v. Taylor, 13 Price, 636.

broke up, and in a private room he that got the last glass of brandy was declared to be the purchaser. This was decided to be an auction(*w*).

But to bring a bidding within the acts, the sum must be named by the party *eo intuitu*, with a view to the purchase of the estate. Therefore, in the case of *Cruso v. Crisp*(*x*), it was decided, that *putting up* an estate in lots at certain prices was not a bidding within the acts; but this has since been doubted by Lord Eldon(*y*); and although it would be difficult to hold the transaction to be a sale within the act, yet of course, although the owner intends only to put up the estate at a certain price, and not to bid for it in case of an advance, a previous notice of his intention should be given.

If an estate be bought in by the owner, and proper notices were not given of his intention to bid, the sale will be held real, and the duty must be paid, however fair the transaction may be. The duty is made a *charge* on the auctioneer, which he must pay if the proper notices were not given. It is not given by way of *pénalty*. In one case, an auctioneer who had neglected to require proper notices was compelled to pay 5 or 6,000*l.* out of his own pocket for the duty, although he had not received any part of it from the owners, nor had charged any commission, as the estates were not actually sold(*z*).

And a statement by an auctioneer to the vendor or his agent, that he has done what is necessary to avoid payment of the duty, will amount to a warranty, although the duty become payable, not by the default, but by the ignorance or mistake of the auctioneer.

(*w*) 1 Dow, 115.

(*x*) 3 East, 387.

(*y*) 1 Dow, 114.

(*z*) *Christie v. Attorney-General*, 6 Bro. P. C. by Toml. 520; see 3 Ves. Jun. 625, n.

Thus, in the late case of *Capp v. Topham*(a) an auctioneer put up an estate, and by the conditions of sale reserved a dumb bidding(b) to the owner, which was his mode of saving the payment of the auction duty. The owner's solicitor, with the privity of the auctioneer, placed a ticket containing the price in figures, under a candlestick, on a table in the auction-room. A person who attended on behalf of the owner asked the auctioneer if he had taken the proper precaution to avoid the duty if there was no sale. The auctioneer said, it was his mode to fix a price under the candlestick, and if the bidding should not come up to the price there was no sale or duty. There were several biddings, but under the price fixed, and the auctioneer was compelled to pay the duty(c). He then brought an auction against the owner for recovery of the money as paid to his use; but the statements by the auctioneer were holden to amount to a warranty, and judgment was given for the defendant. Lord Ellenborough said, that even if there was no warranty on the part of the auctioneer, and it was only a mutual error between him and the vendor, he could not call upon his companion in error for a contribution(d). So that in cases of this nature the burden will remain upon the person upon whom it is charged. And it even seems to have been considered, that if an auctioneer, through ignorance, adopt an improper mode of saving the duty, upon an undertaking by the seller to save him harmless, the duty must be paid by the auctioneer, and he cannot recover under the undertaking, because it is illegal to indemnify against *penalties*(e). But to this it

(a) 6 East, 392 ; 2 Smith, 443.

(b) *Vide supra*.

(c) See *Christie v. Attorney-General*, *ubi sup*.

(d) See *Farebrother v. Ansley*, 1 Camp. N. P. 343. *Jones v. Nanney*, 13 Price, 76.

(e) *Owen v. Parry*, Sitt. West. Dec. 6, cor. Lord Ellenborough.

may be objected, that the duty attaches as a charge, and is not imposed as a penalty(*f*).

If the vendor's title prove bad, the auction duty will be allowed; provided complaint thereof be made before the Commissioners of Excise, or two justices of the peace within whose jurisdiction such sale was made(*g*), within twelve calendar months after the sale, if the same shall be rendered void in that time; or otherwise within three months after the discovery of the owner having no title(*h*). But the commissioners will not allow the duty unless they think that the vendor has used his *utmost exertions* to make a good title. An appeal, however, lies from the judgment of the commissioners: but as the King never pays costs, they fall upon the vendor, and in many cases would amount to more than the duty itself. Where the case is a *bona fide* one, and the title has been rejected, the commissioners are bound to put a liberal interpretation on the act.

II. According to Cicero(*i*), a vendor ought not to appoint a puffer to raise the price, nor ought a purchaser to appoint a person to depreciate the value of an estate intended to be sold.(1) And Huber lays it down(*j*), that if a vendor employs a puffer he shall be compelled to sell the estate to the highest *bona fide* bidder; because it is against the faith of the agreement, by which it is stipulated that the highest bidder shall be the buyer.

(*f*) *Christie v. Attorney-General*, 6 Bro. P. C. by Toml. 520. *et supra*.

(*g*) 19 Geo. III. c. 56. s. 11.

(*h*) 28 Geo. III. c. 37. s. 19.

(*i*) *De Off.* l. 3.

(*j*) *Prælectiones*, xviii. 2. 7.

(1) *Moncrieff v. Goldsborough*, 4 Har. & M'Hen. 282. *Troughton's Adm. v. Johnson*, 2 Haywood's Rep. 328. *Donaldson v. M'Roy*, Browne's Rep. 346.

In *Bexwell v. Christie*(*k*), Lord Mansfield and the other Judges of B. R. followed the rule of the civil law, and treated a *private* bidding, by or on the behalf of the vendor, as a fraud ; but the Legislature, by the subsequent statutes imposing a duty on sales of estates by auction, seems to have been of a different opinion, and even to have sanctioned it. Lord Rosslyn, who was present at the making of the act, remarked in the case of *Conolly v. Parsons*, that(*l*) the acts of Parliament go upon its being an usual thing and a fair thing for the owner to bid. The pressure, when the tax was imposed, was by embarrassing people, who chose to dispose of their goods by auction if they chose to be purchasers, by the tax falling upon them. His Lordship added, that he thought it would have occurred either to Lord Thurlow or to him, when the exception in favor of the owner was proposed, that the case would not exist, as the owner could not be a bidder ; or that, for his attempting to do what he could not by law, it would be just that he should pay the duty.. It was very wrong to the public to let that clause stand, if at the time it was understood that the owner bidding was doing an illegal thing. The acts do not require an open notice, but only a private notice to the auctioneer, and an oath to prevent the setting up a bidding for the owner that the bidder might evade paying the duty.

Lord Kenyon, however, in the case of *Howard v. Castle*, where the purchaser was the only real bidder, and there were several puffers(*m*), clearly coincided with Lord Mansfield's opinion ; and held, that unless it was publicly known that the owner intended to bid, it was a fraud upon the purchaser, and consequently no action would lie against

(*k*) H. 16. Geo. III. Cowp. 395.

(*l*) See 3 Ves. jun. 628.

(*m*) 36 Geo. III ; 6 Term Rep. 642. See *Twining v. Morris*, 2 Bro. C. C. 326 ; and see 3 Term Rep. 93, 95.

him for non-performance of his agreement. The acts of Parliament, he thought, did not intend to interfere with this point, but to leave the civil rights of mankind to be judged of as they were before. And Grose, J. also expressed his opinion, that the doctrine was not in the least impeached by the acts of Parliament.

But in the case of *Conolly v. Parsons*(*n*), Lord Rosslyn said, he fancied the foregoing case turned on the circumstance that there was no real bidder ; and the person refused instantly. It was one of those trap auctions which are so frequent in this city. The reasoning went large, certainly, and did not at all convince him. He said, he should wish it to undergo a re-consideration ; for if it was law, it would reduce every thing to a Dutch auction, by bidding downwards(*I*). He felt vast difficulty to compass the reasoning, that a person does not follow his own judgment because other persons bid ; that the judgment of one person is deluded and influenced by the biddings of others.

(*n*) 3 Ves. jun. 625, *n*.

(*I*) A sale of this nature is thus conducted : The estate is put up at a high price, and if nobody accept the offer, a lower is named, and so the sum first required is gradually decreased, till some person close with the offer. Thus there is of necessity only one bidding for the estate, a mode of sale which, in this country, would attract few bidders. In some counties in England a singular mode of sale of estates for redemption of land-tax is adopted ; the auctioneer states the sum of money wanted, and the number of acres to be disposed of, and the person who will accept the least quantity of land for the sum required, is declared the purchaser ; so that the persons bid downwards, until some one name a quantity of land less than any other will take.

The manner of conducting sales by auction of the post-horse duties is at once Dutch and English. The duties are put up at a large sum, named in the particulars, and the sale is then conducted in the same manner as a Dutch auction : but when any person actually bids, others may advance on that bidding, and the highest bidder is declared the purchaser ; just as if the sale had been conducted in the usual way.

The facts of the case of *Conolly v. Parsons* do not appear in the report; but I learn, that there was a contest between real bidders, after the person employed to bid on the part of the vendors had desisted from bidding. The suit was compromised by the purchaser paying a considerable sum of money to the vendor to release him from the contract; and consequently Lord Rosslyn did not give judgment; but it seems he was clearly of opinion that the sale was valid.

And in the later case of *Bramley v. Alt(o)*, where an estate was put up to sale by public auction, and an agent for the vendor bid to 75*l.* an acre, without public notice of his intention to do so; and after a contest with real bidders the estate was bought at 101*l.* 17*s.* an acre; Lord Alvanley, then Master of the Rolls, decreed a specific performance with costs. And he concurred with Lord Rosslyn in considering the case of *Howard v. Castle* only as a decision, that where all the bidders except the purchaser are puffers, the sale shall be void.

In a subsequent case(*p*), it appeared that assignees of a bankrupt had put up the estate to sale by auction. It was proved that a bidder was employed on their parts to bid up to, but not to exceed 750*l.*, the sum for which the estate was actually sold. The Master of the Rolls held, that the assignees had not committed any fraud, they did not employ the bidder for the purpose, generally, of enhancing the price, but merely to prevent a sale at an undervalue, and they stated, previously, what they conceived to be the true value, below which the lot ought not to be sold. His Honor treated the case of *Howard v. Castle* as having proceeded on the ground of plain and direct fraud, and said, that in a similar case he should come to a similar conclusion.

By these decisions, therefore, it was settled, that

(*o*) 3 Ves. jun. 620.

(*p*) *Smith v. Clarke*, 12 Ves. jun. 477.

a bidder may be privately appointed by the owner in order to prevent the estate from being sold at an under-value; and that if there were real bidders at a sale, it must be supported, although the bidding immediately preceding that of the purchaser was fictitious(*q*); and that where public notice has been given, the contract will be binding on the purchaser, although there was no contest between real bidders; but only the purchaser and the person employed to bid, bid against each other(*r*). It should seem that consistently, with the above authorities, the rule would be the same, even where public notice had not been given, provided the bidder was appointed only to protect the vendor's interest.(2)

But where a person is employed, not for the defensive precaution, with a view to prevent a sale at an under-value, but to take advantage of the eagerness of bidders to screw up the price, that will be deemed a fraud(*s*).

Neither do the cases authorize the vendor to appoint more than one person on his behalf. It seems highly proper that a vendor should be permitted to appoint a person to *guard* his interests against the intrigues of bidders; but it does not follow that he may appoint more than one. The only possible object of such a proceeding is fraud. It is simply a mock auction; and, notwithstanding Lord

(*q*) *Smith v. Clarke*, 12 Ves. jun. 477.

(*r*) *Oldfield v. Round*, 5 Ves. jun. 508.

(*s*) See 12 Ves. jun. 483. In *Fitzgerald v. Forster*, 31st July, 1813, the Vice-Chancellor seemed rather to be of opinion that the appointment of one puffer was, in no case, bad.

(2) In *South Carolina*, it has been decided that a person may be employed to bid on the part of the vendor, at a public sale of lands; and the purchaser at such sale will be compelled to complete the purchase, although he had no notice that such person was so employed, and the price at which the land was knocked down, was, by such means, enhanced much beyond its real value. *Jenkins v. Hogg*, 2 Const. Rep. 821.

Rosslyn's impression, it is universally felt and acknowledged, that the judgments of most men are deluded and influenced by the biddings of others. As far as any aid is sought from the auction-duty acts, in support of private biddings on behalf of the owner, it is clear that they do not authorize or sanction the appointment of more than one person. In the report of *Conolly v. Parsons* it is stated, that *persons* were employed to bid, and did bid for the vendors; but the fact is, that one person only was employed by them, and actually bid on their behalf. The Master of the Rolls observed, in the late case of *Smith v. Clarke*, that he did not see, that if several bidders were employed by the vendor, in that case, a court of equity would compel the purchaser to carry the agreement into execution; for that must be done merely to enhance the price. It was not necessary for the defensive purpose of protection against a sale at an undervalue(*t*).

In a later case upon this subject, Lord Tenterden held clearly that the sale was void in point of law, as two persons had been employed to bid, although they were both limited not to go beyond the same fixed sum. The current of authority, therefore, is clearly against the validity of such a sale(*u*).

In the same case, the learned Judge also expressed his opinion, that if only one person be appointed to bid, with a view to save the auction duty, the sale is void, unless it be announced that there is a person bidding for the owner. The act itself is fraudulent: the statute was made for a different purpose, with a view to the duty only, and cannot be made to sanction what is in itself fraudulent.

And this opinion has since been followed in the Exchequer, where upon a sale by the Crown of an estate seized under an extent, it was stipulated, that "on the part of

(*t*) See 12 Ves. jun. 483; and see 8 Term Rep. 93. 95.

(*u*) *Wheeler v. Collier*, 1 Mood. & Malk. 123.

the Crown, Mr. E. Driver should be at liberty to make one bidding, but no more, and if the highest bidder, the sale to be void ;” and a puffer was employed at the auction by Mr. Driver, the agent for the Crown ; the court held that the sale was not binding upon the purchaser. The Court considered it clear, that in an ordinary case the employment of a puffer vitiated the sale, and there was no reason why the Crown should be subject to a different rule(*v*). But we cannot fail to perceive that in this last case the condition was pregnant with a negative, that no puffer should be employed. The strong leaning of the courts, however, is at present against the validity of a sale where even a single puffer is employed, although after the decisions to the contrary upon this point, which are daily acted upon, it would be difficult to come to such a conclusion, except in the House of Lords.

Although an original purchaser will not be bound where a fraud has been practised in the biddings, yet if he transfer his contract, a strong case of fraud must be made out against the original purchaser, to enable the court to give the benefit of it to his assignee, who was not induced through competition to give the price(*v*).

If the particulars or advertisements state (as they frequently do) that the estate is to be sold *without reserve*, it seems clear that the sale would be void against a purchaser, if any person were employed as a puffer, and actually bid at the sale. This was actually decided in the late case of *Meadows v. Tanner*(*w*). The Vice-Chancellor said, that the plain meaning of the words *without reserve*, in a particular of sale, is, that no person will be employed to bid on behalf of the vendor for the purpose of keeping

(*v*) 3 You. and Jer. 331, and see *Crowder v. Austin*, 3 Bing. 368, 11 Moo. 283.

(*v*) See 12 Ves. jun. 484.

(*w*) 5 Madd. 84.

up the price ; and that the vendor could have no claim to the aid of a court of equity to enforce a contract against the purchaser, into which he might have been drawn by the vendor's want of faith.

It is generally understood, that some person will bid on the part of the owner ; and it therefore seems to deserve consideration, whether it would not, in most cases, be advisable to give public notice of the owner's intention previously to the sale. Where public notice is given, the mode least liable to objection seems to be that of reserving a bidding, or stipulating in the conditions of sale, that the owner may bid once in the course of the sale(*x*). It may here, however, be proper to observe, that buying-in an estate, especially where it is done without public notice, mostly prejudices a future sale. This was exemplified in the sale of an estate before one of the Masters in Chancery, where 23,000*l.* was *bona fide* bid, and the estate was bought in by the agent of the vendor ; afterwards there were three other sales in the Master's office ; and the consequence of the estate having been bought-in deterring others from bidding, was, that on the two first occasions no more was offered than 12,000*l.* and 6,000*l.* ; and the estate finally sold for 15,000*l.*(*y*)

On the other hand, if a purchaser by his conduct deter other persons from bidding, the sale will not be binding. Thus, where upon a sale by auction of a barge, a bidder addressed the company present, saying he had a claim against the late owner, by whom he said he had been ill used, whereupon no one offered to bid against him ; but the auctioneer refusing to knock down the property to a single bidding, a friend of the bidder's bade a guinea more, and the first bidder then made a

(*x*) See Cowp. 397.

(*y*) See 6 Ves. jun. 629 ; Wren v. Kirton, 8 Ves. jun. 502 ; and see Twining v. Morris, 2 Bro. C. C. 326.

second and higher bidding, amounting, however, to only one fourth of the prime cost of the barge; it was held that there was no legal sale(z). (3).

III. The particulars and conditions of sale(a) next claim our attention.

It seems that the Judges will so construe them as to endeavor to collect the meaning of the parties, without

(z) *Fuller v. Abrahams*, 3 Brod. & Bing. 116; S. C. 6 Moo. 316.

(a) See a form of them, App. No. 4.

(3) Where there was an agreement by the owner of an execution, with certain other persons, to prevent the usual competition at a sheriff's sale, in order to leave a balance on the execution, for the purpose of seizing other lands of the debtor, whereby the property was sold for a mere nominal price, it was held, that the sale was void. *Troup v. Wood*, 4 Johns. Ch. Rep. 228, 254. See *Bradie v. Seagroves*, 2 Hayw. 70.

So, where two persons, being desirous of purchasing certain articles advertised for sale at auction, agreed not to bid against each other, but that one of them should bid in the property, which should be divided between them, it was decided, that such agreement was without consideration and void, and against public policy. *Doolin v. Ward*, 6 Johns. Rep. 194. See *Wilbur v. How*, 8 Johns. Rep. 346. 2d edit. *Thompson v. Davies*, 13 Johns. Rep. 112. *Jones v. Caswell*, 3 Johns. Cas. 29.

So, a purchase, by an executor or administrator, of the estate of the testator or intestate, where others were deterred, from bidding in consequence of doubts as to the title, suggested by the purchaser, whereby he obtained the property at an undervalue, will be annulled in equity. *Hudson v. Hudson*, 5 Munf. 180. See *Wood's Exr. &c. v. Hudson*, 5 Munf. 423.

And where the advertisement of a sale, contains an assertion which is false, as, that the land is to be sold for the satisfaction of *three* mortgages, when there are *two* only, by which purchasers may be deterred from bidding, the sale will be deemed irregular and void. *Burnet v. Denniston*, 5 Johns. Ch. Rep. 35.

encumbering themselves with the technical meaning of the words.

Thus where (b) the city of London let an estate by auction for a term of years, according to certain conditions of sale, by which it was stipulated that the purchaser should pay a certain *rent* before the lease was granted, which he accordingly agreed to do, the Court of King's Bench held that although the money to be paid could not be strictly called a rent, the relation of landlord and tenant not having then commenced, yet the parties intended the money should be paid, and it must be paid accordingly. Lord Kenyon said, he had always admired an expression of Lord Hardwicke's, "that there is no magic in words." But an agreement for purchase, with a stipulation, that until the conveyance is made the purchaser shall pay and allow to the seller at the rate of a fixed sum per annum, three half-yearly payments will create the relation of landlord and tenant, and the sum payable will be recoverable as rent (c).

Great care, however, should be taken to make the particulars and conditions accurate; for the auctioneer cannot contradict them at the time of sale, such verbal declarations being inadmissible as evidence (4).

Thus, where estates were put up to sale by auction (d), and in the printed particulars of sale were stated *to be free from all incumbrances*, they were bought by a person who, discovering that there was a charge on the estate of 17*l.* per annum, refused to complete the purchase, in con-

(b) *City of London v. Dias*, Woodfall's L. & T. 301.

(c) *Saunders v. Musgrave*, 6 Barn. & Cres. 524; S. C. 9 Dowl. & R. 529.

(d) *Gunnis v. Erhart*, 1 H. Black. 289; see *Jones v. Edney*, 3 Camp. Ca. 285, 6; *Bradshaw v. Bennett*, 5 Carr. & Pay. 48.

(4) See *Grantland v. Wight*, 2 Munf. 179, *contra*, *ut scilicet*. *Wright's Les. v. Dickline*, 1 Peter's Rep. 199.

sequence of which, an action was brought by the vendor ; and although he offered to give in evidence, that the auctioneer had publicly declared from his pulpit in the auction-room, where the estate was put up, that it was charged in the manner above specified, yet the court of C. B. refused to admit the evidence, as it would open a door to fraud and inconvenience, if an auctioneer were permitted to make verbal declarations in the auction-room, contrary to the printed conditions of sale ; and the plaintiff was nonsuited. And this rule prevails in favor as well of the (*)seller as of the purchaser(e), and it equally applies to a sub-sale ; therefore, if A. buy at a sale after a formal explanation at the sale, which was heard by B., and then re-sell to B., the first declaration is no more binding upon B. than A., and therefore A. cannot enforce the contract, as explained by the auctioneer, against B.(f).

The same rule of course prevails in equity, where the person setting up the parol evidence is plaintiff. Upon the sale of an estate by auction the particular was equivocal as to the words : but it was clear the purchaser was to pay for timber and timber-like trees. There was a large underwood upon the estate. At the sale, the article being ambiguous, the auctioneer declared he was only to sell the land ; and every thing growing upon the land must be paid for. The *defendant*, the purchaser, insisted he was only to pay for timber and timber-like trees, not for plantation and underwood. The declaration at the sale was distinctly proved ; but it was determined by the Court of Exchequer that the parol evidence was not admissible(g)(5).

(e) *Powell v. Edmunds*, 12 East, 6.

(f) *Shelton v. Livins*, 2 Crompt. & Jer. 411.

(g) *Jenkinson v. Pepys*, 6 Ves. jun. 330, cited ; 15 Ves. jun. 521, stated.

(5) But, it seems, that a purchaser of an estate at auction, is bound

Nor when the seller is plaintiff can parol evidence be admitted on his behalf, of the declarations at the sale, although the purchaser by the written agreement bind himself to abide by *the conditions and declarations made at the sale*(*h*)(6).

But a question has been raised, whether, if by a collateral representation a party be induced to enter into a written agreement, different from such representation, he may not have an action on the case for the fraud practised to lay asleep his prudence(*i*)(7).

(*) And if the purchaser have particular personal information given him of an incumbrance, or of the nature of the title, it seems that the parol evidence may be admitted(*j*). It may therefore be proved that the purchaser perused the original lease before the sale(*k*). Such evidence may be used in equity as a *defence* against the specific performance, if the parol variation was in favor of the defendant, and the plaintiff seek a performance in specie according to the written agreement(*l*)(8).

(*h*) *Higginson v. Clowes*, 15 Ves. jun. 515.

(*i*) See *Powell v. Edmunds*, 12 East, 6.

(*j*) *Gunnis v. Erhart*, 1 H. Black. 289 ; and see *Pember v. Mathers*, 1 Bro. C. C. 52 ; *Fife v. Clayton*, 13 Ves. jun. 546, where the particular was altered before the sale. *Ogilvie v. Foljambe*, 3 Mer. 53.

(*k*) *Bradshaw v. Bennett*, 5 Carr. & Pay. 48.

(*l*) *Higginson v. Clowes*, *ubi sup.*

by the verbal declarations of the auctioneer, publicly made at the sale, and before the biddings commenced, not variant from the terms advertised, but merely additional and explanatory ; and that the purchaser may be compelled to complete his purchase according to the terms so explained. *Cannon v. Mitchell*, 2 Des. 320. See *Wainwright v. Read et al.* 1 Des. 573.

(6) See *Contra. Grantland v. Wight*, 2 Munf. 179.

(7) See *Bulkley v. Storer*, 2 Day, 531. *Monell v. Colden*, 13 Johns. Rep. 395.

(8) See *Ten Broeck v. Livingston*, 1 Johns. Ch. Rep. 357. *Wainwright v. Read et al.* 1 Des. 573.

(*33)

If it be the custom in a public auction-room to paste up the conditions of sale in the room, and the auctioneer announces that the conditions are as usual, they will, if pasted up according to the usual custom, be binding on the purchaser, although he did not see them(*m*). This can seldom, however, happen upon a sale of estates.

The late Mr. Bradléy recommended, that where it is understood, at the time of sale, that the vendor has only a doubtful title, a provisional clause, to the following effect, should be inserted in the conditions of sale and articles of purchase; which would be sufficient, he thought, to obviate any doubt that might otherwise arise at the sale :

“That if the counsel of the purchaser shall, on the examination of the title, be of opinion that a good title and conveyance cannot be made of the purchased premises, within the time limited by the articles for carrying the same into execution; in that case, the same articles shall be discharged, and not further proceeded in on either side.”

(*) The estate cannot be too minutely described in the particulars; for although, as Lord Thurlow observed, it is impossible that all the little particulars relative to the quantity, the situation, &c. should be so specifically laid down, as not to call for some allowance and consideration, when the bargain comes to be executed(*n*); yet, if a person, however unacquainted in the actual situation of his estate, will give a description, he must be bound by that, whether consistent of it or not(*o*)(9).

(*m*) *Mesnard v. Aldridge*, 3 Esp. Ca. 271.

(*n*) See 1 Ves. jun. 224, *per* Lord Thurlow.

(*o*) See 1 Ves. jun. 213, *per* Lord Thurlow; *Schneider v. Heath*, 3 Camp. Ca. 506.

(9) See *Judson v. Wass*, 11 Johns. Rep. 525. *AP Ferran v. Taylor*, *et. al.*, 3 Cranch, 270. *State v. Gaillard et. al.* 2 Bay, 11.

Lord Ellenborough has observed, that a little more fairness on the part of auctioneers, in the forming of their particulars, would avoid many inconveniences. There is always either a suppression of the fair description of the premises, or there is something stated which does not belong to them; and in favor of justice, considering how little knowledge the parties have of the thing sold, much more particularity and fairness might be expected. The particulars, his Lordship added, are in truth like the description in a policy of insurance, and the buyer knows nothing but what the party communicates(*p*).

In one case(*q*) the conditions of sale stated a house to be "a free public-house." The lease contained a covenant to take beer from the lessors; the auctioneer read over the whole lease in the hearing of the bidders, but he stated erroneously that the covenant had been decided to be bad. The purchaser brought an action to recover his deposit. Lord Ellenborough said, that in the conditions of sale this is stated to be "a free public-house." Had the auctioneer afterwards verbally contradicted this, (*)he should have paid very little attention to what he said from his pulpit. Men cannot tell what contracts they enter into if the written conditions of sale are to be controlled by the babble of the auction-room. But here the auctioneer, at the time of the sale, declared, that he warranted and sold this a free public-house. Under these circumstances, a bidder was not bound to attend to the clauses of the lease, or to consider their legal operation.

Where a lease is sold, the purchaser is not bound to complete his purchase if any part of the buildings demised have been removed, although he heard the lease

(*p*) See 3 Smith, 439; and see *Duke of Norfolk v. Worthy*, 1 Camp. Ca. 337, and *post*. *Waring v. Hoggart*, 1 Ry. & Mood. 39.

(*q*) *Jones v. Edney*, 3 Camp. Ca. 284.

(*35)

read, and the particulars did not comprise the building in question(*r*).

But where the agreement was to sell the lease of a *public-house*, described as held at a certain net annual rent, under common and usual covenants, it was held that the contract was binding upon the purchaser, although the lease contained a covenant by the tenant to pay the land-tax, sewers rate and all other taxes, and a proviso for re-entry if any business but that of a victualler should be carried on in the house(*s*).

In a case where the original lease contained a power of re-entry if certain trades were carried on upon the property, and the lessee granted under-leases containing no such stipulation, and upon a sale by the assignee of the original lessee, the conditions of sale stated the covenant in the original lease, and that such covenant would be inserted in the under-leases to be granted to the purchasers, but no mention was made whether the covenant was inserted in the under-leases already granted, the purchaser was allowed to recover his deposit from the (*)auctioneer(*t*). Lord Tenterden observed, that he was of opinion that it is the duty of every person truly and honestly to represent that which he is to sell. A careful man and a lawyer looking at these conditions of sale might ask what were the terms of the leases which had been granted: The purchaser is informed by the statement in the conditions, that the original lessee is restrained from carrying on these obnoxious trades, and that in the leases to be granted to him a similar covenant is to be entered into. None but a very careful person would suppose that it could be doubtful whether the

(*r*) *Granger v. Worms*, 4 Camp. Ca. 83.

(*s*) *Bennett v. Womack*, 7 Barn. & Cress. 627; S. C. 1 Man. & R. 644.

(*t*) *Waring v. Hoggart*, 1 Ry. & Mood. 39.

persons to whom under-leases had already been granted were bound in the same manner. He was, therefore, clearly of opinion that the plaintiff could not be bound to take the title.

In stating an estate to be of any given "clear" yearly rent, the parties should attend to the meaning of the word "clear," in an agreement between buyer and seller; which is clear of all outgoings, incumbrances, and extraordinary charges, not according to the custom of the country, as tythes, poor-rates, church-rates, &c. which are natural charges on the tenant(*u*).

As we have already seen, the statement that the property is in lease binds the purchaser to the covenants in the lease(*v*). In *Barraud v. Archer*(*w*) the particulars of sale described the estate, which was in the Isle of Ely, as consisting of fen land, and as being let to a tenant at the yearly rent of 165*l.*, and stated that the lessor allowed the eau-brink-tax and land-tax. It appeared that the estate was also subject to other taxes for embanking and draining, under a local public act of (*)Parliament, and as they were not mentioned in the particulars, the purchaser claimed a compensation for them. On the part of the seller, it was insisted that there was no misrepresentation, and that the particular expressly mentioned that the estate was fen land, and enumerated all the taxes which the landlord allowed to the tenant, and that it was not usual to state the taxes which the tenant paid. The Vice-Chancellor held that the purchaser was not entitled to a compensation(*x*).

But if there was a misrepresentation, of course the purchaser would be entitled to a compensation.

(*u*) *Earl of Tyrconnel v. Duke of Ancaster*, Ambl. 237 ; 2 Ves. 500.

(*v*) *Supra*, p. 9.

(*w*) 2 Sim. 433.

(*x*) *Lord Townsend v. Granger*, 2 Sim. 433.

(*37)

The mere exhibition of a plan of a new street, at the time of the sale of a piece of ground to build a house in the line of the intended street, does not amount to an implied contract to execute the improvements exhibited on the plan, where the written contract is silent on that head(y).

Where the timber and other trees are to be taken by the purchaser at a valuation, it should be stated accurately for what trees he is to pay.

In a case where there were several lots, it was stated after two of them, that the timber on them was to be paid for. The particulars were silent as to the timber on the other lots, which was of considerably greater value; but there was a general condition that all the timber and timber-like trees, down to 1s. per stick inclusive, should be taken at a fair valuation. The purchaser of the lots, to which no statement was annexed, claimed the timber without paying for it; and the Master of the Rolls thought that a purchaser might be so fairly impressed with that idea, notwithstanding the general condition, (*)that he refused to compel him to perform the contract according to the seller's construction(z).

But although it should be merely stipulated that the purchaser shall pay for *timber* yet he must pay for trees not strictly timber, if considered so, according to the custom of the country(u).

It is proper, also, to make some provision as to articles not properly fixtures. Lord Hardwicke said, that if a man sells a house where there is a copper, or a brew-house where there are utensils, unless there was some

(y) *Feoffees of Heriott's Hospital v. Gibson*, 2 Dow, 301; see *Compton v. Richards*, 1 Price, 27; *Beaumont v. Dukes*, 1 Jac. 422.

(z) *Higginson v. Clowes*, 15 Ves. jun. 516.

(u) *Duke of Chandos v. Talbot*, 2 P. Wms. 601; *Anon.* Ch. 25 July, 1808; *Rabbett v. Raikes*, Woodfall L. & T. 224, 6th ed; and see *Aubrey v. Fisher*, 10 East, 446.

consideration given for them, and a valuation set upon them, they would not pass^(b). But in the absence of any stipulation, common fixtures would pass to the purchaser under the common conveyance^(c)(10).

(b) *Ex parte Quincey*, 1 Atk. 478.

(c) *Colegrave v. Dias Santos*, 2 Barn. & Cress. 76 ; 3 Dowl. & R. 255.

(10) A kettle in a fulling mill, set in brick work, and used for dying cloth, will pass to the mortgagee in fee of the mill ; though no mention of the appurtenances be made in the deed. *Union Bank v. Emerson*, 15 Mass. Rep. 159.

What ought to be considered a fixture depends, materially, upon the nature of the freehold sold. If a plantation, then all such things attached to the land, which are usually necessary, or used in the management of a farm would pass. If a freehold fitted up for a trade of any kind, or for manufactures, is sold to a person intending to follow the same business, then all the machinery necessary to the trade, or manufacture, so intended to be carried on, would pass. (By the Court in 1 Bailey's S. C. R. 541.) The action was trover for a cotton gin, which was attached to the gears in the gin-house ; and it was held to be a fixture, which passed by the contract of sale. But in the earlier case of *M'Clintock v. Graham*, 3 M'Cord, 553, where the question was in respect to a still and vessels set up in a rock furnace, which was built against the wall. The claim of the purchaser was under a sheriff's sale ; and the court were very clear, that it did not pass by the contract of sale. The Court, Colcock, J. observed—If it was a mere temporary thing not necessary to the enjoyment of the freehold ; as between executor and heir, I should hold there was no doubt but that it must pass. But all difficulty in this case must vanish when we consider the question in relation to the parties claiming ; as to them it becomes a mere question of contract. C. the first purchaser from T. says, when he bought the land, the still was excepted ; and G., who sold to the defendant, says, he never heard a word about the still when he was buying, and did not consider himself as buying the still. Now, whatever rights may be acquired by those who succeed ; if before they enter, the owner of the freehold himself makes a severance, there can be no room for doubt.

The case of vendor and vendee is different from that of landlord and tenant. Spencer, C. J. says in *Holmes v. Tremper*, 20 Johns. R. 29, " when a farm is sold without any reservation, the same rule would apply, as to the right of the vendor to remove fixtures, as exists between

When the title-deeds cannot be delivered up, some provision should be made as to the expense of the attested

the heir and executor." That rule is ; whatever is affixed to the freehold becomes part of it, and cannot be removed. The vendor has the absolute control, not only of the land, but of the improvements ; and he has an election to sell or not to sell. If he does sell, he knows the fixtures pass ; not being in such cases personal property. These principles were recognised in *Miller v. Plumb*, 6 Cowen, 665, where Plumb conveyed by deed without reservation, an ashery, in which the kettles were set in mason work, but the arches were upon a platform ; and not fastened to the building. The troughs were sunk in the ground. Miller, who purchased the premises demised the ashery ; and the lessee entered into possession and used the kettles until a fire consumed the building. The question being as to the fixtures, held, that the fixtures passed by the conveyance ; but the plaintiff recovered in trover for some small articles not annexed to the freehold.

A tenant for life, years, or at will, may at the expiration of his estate remove from the freehold all such improvements as were erected or placed there by him, the removal of which will not injure the premises or, put them in a worse plight than they were in when he took possession. Therefore, in *Whiting v. Brastow*, 4 Pick. 310, where the plaintiff sued the defendant in trespass for entering his close and carrying away a padlock and some boards put up in the corn house for binns ; but neither were in any way fastened to the building. The defendant was but a tenant at will when the plaintiff purchased the estate. The Court held, that neither the padlock nor boards could be called a fixture. If put there by the landlord, they would not be fixtures ; for they were loose and moveable without injury to the freehold. So, in *Taylor v. Townsend*, 8 Mass. 411, it was decided that a mortgagee, after a recovery by the mortgagor on a bill in equity to redeem ; and until an execution of the decree of the court, may take down any buildings erected by him, the materials of which were his own ; and which were not so connected with the soil as that they could not be removed without prejudice to it. It is enough for the tenant to say, " I leave you the land as I found it." *A fortiori* it ought to apply to a mortgagee who has held the estate for years under a conveyance from the owner.

In *Gray v. Holdship*, 17 S. & R. 413. it was held, that a copper kettle or boiler, which was fastened and fixed in the building, which was used as a brewery, and an essential part of it, was subject to the mechanic's lien law. Smith, J. distinguished this case from that in 14 Mass. R. 352, in which three carding machines in a wool carding

copies, and the covenants to produce them, which will otherwise fall upon the vendor(*d*) ; and where the estate is sold in many lots, and the title-deeds are numerous, nearly the whole purchase-money may, perhaps, be exhausted. In one case, the lots were more than 200, and the copies came to 2,000*l*.

If the estate is leasehold, and the vendor cannot procure an abstract of the lessor's title, this fact should be stated in the conditions(*e*).

(*d*) *Dare v. Tucker*, 6 Ves. jun. 460 ; and *Berry v. Young*, 2 Esp. Ca. 640, n. See *post*. c. 9.

(*e*) See *post*. ch. 7 ; and see *Denew v. Deverell*, 3 Camp. 451.

factory, were considered as personal property. There the carding machines were not a necessary part of the factory, and essential to its operations. They *stood on* the floor, and were not annexed to the building, except by a leather band, which passed over the wheel or pulley, to give motion to the machines. Here, the boiler was fastened and fixed in the building. He cited the case of the *Union Bank v. Emerson*, *supra*, and that from *Mason's R.* 459, in which Justice Story, decided, that the main mill-wheel and gearing of a factory attached to the same and necessary for its operations, are fixtures and *real estate*.

If one erect buildings upon the land of another voluntarily and without any contract, he may not remove them. Thus, in *Washburn et al. v. Sproat*, 16 Mass. 449, where the husband erected buildings on land, the fee of which was in the wife, held, that the buildings were not liable for his debts ; his estate being insolvent after his decease. So, in *Goddard v. Bolster et al.* 6 Greenl. 427, where an agent of the owner of a mill put his own mill-stones and mill-irons into the mill, so as to become a part of the freehold, held, that neither the agent, nor his creditors could seize them, though the mill had been destroyed by a flood, and they alone remained.

It seems, however, that where the owner of land consents to the erection of a dwelling for the accommodation of a son, under an expectation, that the former would devise the land to the latter at some future time, the property of the building is personal property : and “ perhaps the son, or persons claiming under him by purchase or execution, may enter and remove the buildings, without being subject to any other than nominal damages in an action of trespass.” *Wells et al. v. Banister & Trustee*, 4 Mass. 514.

A purchaser of a leasehold estate must covenant with the vendor to indemnify him against the rent and (*)covenants in the lease, although he is not expressly required to do so by the conditions of sale(*f*); and it will not vary the case that he is not entitled to any covenants for title; for example, where the sale is by an executor of an assignee(*g*); but assignees of a bankrupt selling a lease which was vested in him, cannot require the purchaser to enter into such a covenant for their indemnity or the indemnity of the bankrupt(*h*).

And although a purchaser is not required by the conditions of sale to give an indemnity against the rent and covenants, and an assignment is actually executed without any indemnity being given; yet, even a verbal agreement by the purchaser, before the sale, to secure such indemnity, will be carried into a specific execution, if it be distinctly proved(*i*).

Where a vendor is only an assignee of a leasehold estate, and is not bound by covenant to pay the rent, and perform the covenants in the lease, his liability to do so ceases upon his assigning the estate over(*j*), and consequently, in such case, there is not any thing for a purchaser to indemnify against. It has lately been decided that the assignee is liable to indemnify the lessee who assigned to him against breaches *during the time he (the assignee) is in possession*, although he has not covenanted to indemnify the lessee(*k*).

(*f*) See *Pember v. Mathers*, 1 Bro. C. C. 52; and see *post.* ch. 4, as to the obligation of a purchaser of an equity of redemption to indemnify the vendor against the mortgage-money.

(*g*) *Staines v. Morris*, 1 Ves. & Beam. 8.

(*h*) *Wilkins v. Fry*, 1 Mer. 244.

(*i*) *Pember v. Mathers*, 1 Bro. C. C. 52; and see *post.* ch. 3.

(*j*) See 1 Treat. Eq. 2d ed. p. 350, and Fonbl. n. (*y*) *ibid.*; and see *Taylor v. Shum*, 1 Bos. & Pull. 21.

(*k*) *Burnett v. Lynch*, 5 Barn. & Cress. 589; 8 Dowl. & R. 368.

(*39)

It should always be stated in the conditions, that the (*)conveyance shall be prepared *by* and at the expense of the purchaser(*l*).

The usual condition, "that if the purchaser shall fail to comply with the conditions, the deposit shall be forfeited, and the proprietors be at liberty to re-sell the estate; and the deficiency, if any, by such sale, together with all charges attending the same, shall be made good by the defaulter," should never be omitted. It forms a lien on the estate for the purchase-money, &c. and if the purchaser do not comply with the conditions, the vendor may, by virtue of this stipulation, re-sell the estate, and recover the deficiency and charges from the purchaser(*m*)(11). And if the money produced by the second sale exceed the original purchase-money, the purchaser who has violated the agreement will not be entitled to the surplus, but the vendor himself will be entitled to retain it.

A stipulation in a contract, that in case the vendor cannot deduce a good title, or if the purchaser shall not pay the money on the appointed day, the agreement shall be void, does not enable either party to vitiate the agreement, by refusing to perform his part of it: the seller may avoid the contract, if the purchaser do not pay the money; the purchaser may avoid it, if the seller do not make a title; or the contract will be void, if the seller *cannot* make a title; but it is not sufficient for him to *say* that he cannot(*n*).

(*l*) See *post.* ch. 4.

(*m*) *Ex parte* Hunter, 6 Ves. jun. 94; and See *Moss v. Matthews*, 3 Ves. jun. 279; *Mertens v. Adcock*, 4 Esp. Cas. 251; *sed vide* 7 Ves. jun. 275. See *Greaves v. Ashlin*, 3 Camp. 466.

(*n*) *Roberts v. Wyatt*, 2 Tau. 268.

(11) But the vendor cannot maintain an action against the vendee, for a breach of the contract of sale, until, on a re-sale, the deficit shall have been ascertained. *Webster and Ford v. Hoban*, 7 Cranch, 399.

(*40)

If the purchaser, after breaking the condition, become bankrupt, and the estate is re-sold at a loss, the expenses (*) of the sale, &c. being in the nature of unliquidated damages, cannot be proved under the commission; but as the vendor has a lien on the estate, he may apply the money produced by the last sale of the estate, first, in payment of those articles which it is just he should receive, but which he could not prove under the bankruptcy; then towards payment of the original purchase-money; and the balance may be proved under the commission(o).

In a recent case(p), a leasehold house and furniture had been sold for 4,370*l.* and *the assignment was executed*, but neither it nor the lease, nor possession, had been delivered; and the purchaser declining to complete the contract, the sellers brought an action and recovered the whole amount of the purchase-money and costs. The purchaser became a bankrupt, and the assignees took possession of the house. The seller then sold the house and furniture at a considerable loss: and Lord Eldon considered that they were entitled to a lien for the amount of the sale and costs, and to a proof for the difference, although it was insisted that they were concluded by their action.

If a house be sold, with all the lights belonging to it, and it is intended to build upon the adjoining ground belonging to the same owner, so as to interfere with the lights, a right so to build should be expressly reserved: it will not do to describe the house as abutting on *building ground* belonging to the seller(q).

(o) *Ex parte* Hunter, 6 Ves. jun. 94; *Bowles v. Rogers*, *ibid.* 95, n.; 1 Cooke, 123.

(p) *Ex parte* Lord Seaforth, 1 Rose, 306; *ex parte* Gyde, 1 Glyn & Jam. 323.

(q) *Swanborough v. Coventry*, 9 Bing. 305; S. C. 2 Moo. & S. 362.

(*41)

The condition which has now become almost universal, that any mistake in the description of the estate, &c. (*) shall not annul the sale, will only guard against unintentional errors.

This was decided by Lord Ellenborough in a case where the estate was stated in the particulars to be *about one mile* from Horsham. It turned out that the estate was between three and four miles from that place. Upon an action brought by the purchaser for recovery of the deposit, it was insisted that the effect of the misdescription was saved by the condition, which provided that no error or mis-statement should vitiate the sale. But Lord Ellenborough said, that in cases of this sort he should always require an ample and substantial performance of the particulars of sale unless they were specifically qualified. Here there was a clause inserted, providing that an error in the description of the premises should not vitiate the sale, but an allowance should be made for it. This he conceived was meant to guard against unintentional errors, not to compel the purchaser to complete the contract if he had been designedly misled. His Lordship therefore left it to the jury, whether this was merely an erroneous statement, or the misdescription was wilfully introduced, to make the land appear more valuable from being in the neighborhood of a borough town. In the former case, the contract remained in force, but in the latter case the plaintiff was to be relieved from it, and was entitled to recover back his deposit. The plaintiff had a verdict; so that the jury must have thought the misdescription fraudulent(r)(12).

(r) *Duke of Norfolk v. Worthy*, 1 Camp. Ca. 337; see *Fenton v. Brown*, 14 Ves. jun. 144; 1 Ves. and Bea. 377; *Stewart v. Alliston*, 1 Mer. 26; *Trower v. Newcome*, 3 Mer. 704.

(12) See *M'Ferran v. Taylor et al.* 3 Cranch, 270.

(*42)

So in the case of *Powell v. Doubble(s)*. A house was described, in the particulars of sale, as a brick-built dwelling-house. It turned out that the house was built (*)partly of brick and partly of timber, and that some parts of the exterior were only composed of lath and plaster, and that there was no party-wall to the house. Shortly after the sale, the ancient chimnies fell inwards through the house, but it was not proved to what this was to be attributed. The case was heard upon bill and answer. There was the usual condition about misdescriptions being the subject of allowance. The bill was dismissed with costs, as the Vice-Chancellor was of opinion that such a description means that the house was brick-built in the ordinary sense, and that it was not a subject for compensation.

And although the condition as usual provides for payment of a compensation, yet the sale will be void if from the nature of the case no estimate can be made of the diminution in value. Thus, where a reversion was sold after the death of a person aged sixty-six, in case he should not have children, it turned out that he was only sixty-four, and Lord Tenterden held, that the sale was void. He said that in the case of a reversion simply expectant on the death of an individual, if a mistake be made in his age, a compensation may be made under the condition, for the difference of value may be computed; but where there is an additional contingency, such as that of the birth of future children, in this case the difference of age alters the likelihood of that contingency, and in such a case therefore no estimate can possibly be made of the difference of value between the thing described and the thing sold, and the contract itself must be vacated(*t*).

(s) MS. V. C. 15 June 1832.

(*t*) *Sherwood v. Robins*, 1 Mood. & Malk. 194; S. C. 3 Carr. & P. 339.

A bidding at a sale by auction may be countermanded at any time before the lot is actually knocked down^(u)(13); (*)because the assent of both parties is necessary to make the contract binding; that is signified, on the part of the seller, by knocking down the hammer. An auction is not unaptly called *locus pœnitentiæ*. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. If a bidding was binding on the bidder before the hammer is down, he would be bound by his offer, and the vendor would not, which can never be allowed.

The countermand of a bidding would, in some cases, prove of the most serious consequences; and it might therefore be advisable to stipulate in the conditions of sale, that no person shall retract their biddings.

Although the duty is, by the acts, imposed on the vendor, yet he is not restrained from making it a condition of sale, that the duty, or any certain portion thereof, shall be paid by the purchaser over and above the price bidden at the sale by auction: and in such case the auctioneer is required to demand payment of the duty from the purchaser, or such portion thereof as is payable by him under the condition: and, upon neglect or refusal to pay the same, such bidding is declared by the act to be null and void to all intents and purposes^(v)(I).

(u) *Payne v. Cave*, 3 Term Rep. 148; see *Routledge v. Grant*, 4 Bing. 653; S. C. 1 Moo. & P. 717. As to goods, see *Phillips v. Bistolli*, 3 Dowl. & Ry. 822.

(v) 17 Geo. III. c. 50. s. 8. See 7 Ves. jun. 345.

(I) This provision seems very objectionable. It might be contended, that if a purchaser disliked his bargain, his refusal to pay the auction duty would annul the sale, and throw the whole expense attending it on the vendor, whose estate would still remain unsold. If there be any foundation for this argument, the clause in question should not be permitted to stand in its present shape.

(13) See *Downing v. Brown et al.* Hardin, 181.

(*44)

It is usual to make some provision respecting the payment of the auction duty, as that the vendor and purchaser shall pay it in equal moieties; and indeed, where the purchase-money is liable to the duty, a stipulation of this nature should never be omitted, unless the vendor (*) intend to pay the whole duty himself. If the seller cannot make a title, the purchaser can recover from him the auction duty which he has paid(*w*). And if the sale be not binding, the auctioneer, although he has paid the duty, cannot, under the common condition, recover it from the *purchaser*, as he is called, because, although the highest bidder, he is *not* the purchaser(*x*).

The other provisions which ought to be inserted in conditions of sale, are so well known as not to require notice.

IV. It frequently happens that estates advertised to be sold by auction, are sold by private contract, instead of being brought to the hammer, and the sale is not announced to the public till the day fixed for the auction, and even sometimes not till the auctioneer's appearance in the auction-room. Notice of an intended sale by auction is said to be a contract with all the world: and the parties to whom the notice is addressed ought not to be put to the expense and trouble of attending the auction unless the sale is to take place. It should be stated, therefore, in the advertisements, that the estate will be sold by auction at the place and time fixed upon, *unless previously sold by private contract; in which case notice of the sale shall be immediately given to the public*: and notice should be given accordingly.

If an auctioneer sell an estate without a sufficient authority, so that the purchaser cannot obtain the benefit of his bargain, he (the auctioneer) will be compelled to pay

(*w*) *Cane v. Baldwin*, 1 Stark. 65.

(*x*) *Jones v. Nanney*, 13 Pri. 76; S. C. M'Clel. 25.

all the costs which the purchaser may have been put to, and the interest of the purchase-money, if it has been unproductive(*y*)(13).

(*)If an attorney or agent bid more for an estate than he was empowered to do, he himself would be liable; but it seems that his principal would not(*z*). But unless he were expressly limited as to price, and not enabled to go beyond the limits of his authority, his principal would be bound(*a*)(14).

Where the principal denies the authority, and the agent is compelled to perform the agreement himself, because he cannot prove the commission, he may afterwards file a bill against his principal; and if the principal deny the authority, an issue will be directed to try the fact; and if the authority be proved, the principal will be compelled to take the estate at the sum which he authorized the agent to bid(*b*). If the agent make the agreement in that character, and his authority is denied, and he pays the deposit, he may recover it back in his own name if a good title cannot be made(*c*). If the agency be estab-

(*y*) *Bratt v. Ellis*, MS.; *Jones v. Dyke*, MS. App. Nos. 7 and 8; and see *Nelson v. Aldridge*, 2 Stark. 435; *Jaby v. Driver*, 2 Yo. & Jer. 549.

(*z*) See *Ambl.* 498; 10 Ves. jun. 400.

(*a*) *Hicks v. Hankin*, 4 Esp. Ca. 114. See *East India Company v. Hensley*, 1 Esp. Ca. 112.

(*b*) *Wyatt v. Allen*, MS. App. No. 9.

(*c*) *Langstroth v. Toulmin*, 3 Stark. 145.

(13) See *Dusenbury v. Ellis*, 3 Johns. Cas. 70.

(14) See *Batty v. Carswell et al.* 2 Johns. Rep. 48. *Lee v. Munroe et al.* 7 Cranch, 366.

The principal is liable for the acts of a general agent, acting within the general scope of his authority; and a third person cannot be affected by private instructions from the principal to his agent; but when a special agent acts without authority, the principal is not bound. *Munn v. Commission Co.* 15 Johns. Rep. 44.

(*46)

lished, the agent will be compelled to transfer the benefit of the contract to his principal, although he made the contract in his own name, and swears that it was on his own account(*d*).

If an auctioneer give credit to the vendee, or take a bill, or other security, for the purchase-money, it is entirely at his own risk: the vendor can compel him to pay the money(*e*)(15). As between an agent for the seller

(*d*) *Lees v. Nuttall*, 1 Russ. & My. 53.

(*e*) *Williams v. Millington*, 1 H. Blackst. 81. See *Wiltshire v. Sims*, 1 Camp. N. P. 258.

(15) So, if an auctioneer depart from his instructions, he is liable to his employer for all the damage sustained thereby; as where the defendant, who was an auctioneer, was directed to sell certain goods at auction, on a credit, *taking security from the purchasers for the amount of their purchases*; the goods, were sold, and lands with security, were taken for a part, and the rest were delivered to the purchasers without security; on closing the account of sales with the plaintiffs, the defendant paid a part of the amount in cash, and offered the bonds and open accounts of the purchasers for the residue, which were refused; it was held, that the defendant was liable for the amount both of the bonds and open accounts. *Wilkinson v. Campbell*, 1 Bay, 169.

Where a factor has been instructed to sell goods for cash, and he permits the purchaser to take them away without payment at the time of sale, he is liable, though a usage among factors is proved of allowing to purchasers a week or fortnight to make payment, where the sale has been for cash. *Barksdale v. Brown*, 1 Nott & Mc Cord, 517. See *Van Allen v. Vanderpool*, 6 Johns. Rep. 69. *Goodenow v. Tyler*, 7 Mas. Rep. 36, 42. *James v. M' Credie*, 1 Bay, 294.

An auctioneer selling a house for a sum less than the price limited by his instructions, and crediting the vendor the full price, is bound by it, though the price obtained was the full value of the property sold. *Higginson v. Fabre's Exrs.* 3 Des. 90.

In *Steele et al v. Ellmaker*, 11 S. & R. 86, where goods were sent to auctioneers "to be disposed of by them at the average price of 50 per cent advance on the sterling cost, as quoted in the invoice, but not otherwise;" but the defendants sold them for less: *held*, that the plaintiffs were entitled to recover the difference. Tilghman, C. J. after a commentary upon the English cases, concluded thus: "It is agreed

and a purchaser, it seems that an agent with an undisclosed principal may vary the terms of payment after the sale is completed, the principal may interfere at any time before payment, but not to rescind what has been before done. (*) This is essential to the safety of purchasers. But if a man sell, acting as a broker, the moment the sale is completed he is *functus officii*. The terms of the contract cannot then be altered except by the authority of the principal(*f*)(16).

If a purchaser pay his money to the agent of the vendor before the time when the latter is authorized to receive it, he makes that agent his own for the purpose of paying over the money to the right owner(*g*).

If the seller for a valuable consideration direct his agent to pay over the proceeds of the sale to a third person, he cannot revoke the order(*h*).

The auctioneer should not part with the deposit until the sale be carried into effect(*i*) ; because he is considered

(*f*) See *Blackburn v. Scholes*, 2 Camp. 343.

(*g*) See *Paruther v. Gaitskill*, 13 East, 432.

(*h*) *Metcalf v. Clough*, 2 Mann. & Ryl. 178.

(*i*) *Burrough v. Skinner*, 5 Burr. 2639 ; *Berry v. Young*, 2 Esp. Ca. 640, n. ; *Spurrier v. Elderton*, 5 Esp. Ca. 1 ; and see *post.* ch. 10.

on all hands, (even by Lord Mansfield) that it is fair to limit the price, provided it be made known. The defendant then, being under no injunction of secrecy, might have complied with the plaintiff's orders, without violating the most fastidious rules of morality. Or, if he thought there would be some difficulty in doing this, (the order being not to sell under a certain *average*) he might have said so, and then the plaintiff must have been more explicit in his directions. But without making any objection, or intimating any difficulty, the defendant accepted the commission, and then sold the goods, contrary to his instructions. I confess, I cannot see, how he can be justified, or what should prevent the plaintiff's recovery, as there is no suggestion of any thing unfair, in his conduct, or intentions.

(16) See *Kelley v. Munson*, 7 Mass. Rep. 319.

(*47)

as a stakeholder, or depositary of it(*j*). In a late case, where the auctioneer was also the attorney of the seller, and paid over the money to the seller, after he knew that objections to the title had been raised, an action against him for the deposit was sustained, but the Judges cautiously abstained from pointing out the duty of an auctioneer in any other case(*k*). However, in a later case, where the auctioneer had paid over the deposit to the vendor, without any notice from the purchaser not to do so, and before any defect of title was discovered, it was held that the purchaser (the title being defective) might recover the deposit from the auctioneer(*l*).

If both the parties claim the deposit, the auctioneer may file a bill of interpleader, and pray for an injunction, (*)which will be granted, upon payment into court of the deposit(*m*).

But an auctioneer cannot maintain a bill of interpleader if he insist upon retaining out of the deposit either his commission or the auction duty ; for interpleader is where the plaintiff is the holder of a stake which is equally contested by the defendants, as to which the plaintiff is wholly indifferent between the parties, and the right to which will be fully settled by interpleader between the defendants(*n*).

If upon a bill filed for an injunction, the Court order the deposit to be paid into court, it will, it seems, be after deducting the auctioneer's charges and expenses(*o*), although perhaps this deserves re-consideration ; for the purchaser's deposit may not ultimately be the fund out of

(*j*) *Jones v. Edney*, *cor.* Lord Ellenborough, 4 Dec. 1812.

(*k*) See *Edwards v. Hodding*, 5 Taunt. 815 ; 1 Marsh. 377.

(*l*) *Gray v. Gutteridge*, 1 Mann. & Ryl. 614.

(*m*) *Farebrother v. Prattent*, 5 Price, 303 ; 1 Dan. 64.

(*n*) *Mitchell v. Hayne*, 2 Sim. & Stu. 63 ; but as to the auction duty, see *Farebrother v. Prattent*.

(*o*) *Annesley v. Muggridge*, 1 Madd. 593.

which those charges are to be paid ; but this is done without prejudice to any question as to so much of the deposit as is retained(*p*).

In a case where 1,000*l.* was paid as a deposit to an auctioneer, according to the conditions of sale, and the vendor opposed two motions by the purchaser, in an original and cross-cause filed concerning the contract, for payment of the deposit into court, and the auctioneer became a bankrupt, the loss was holden to fall on the vendor, although the second motion had succeeded, and the day named for payment of the money into court was subsequent to the bankruptcy(*q*). And perhaps a loss by the insolvency of the auctioneer will, in every case, fall on the vendor, who nominates him, and whose agent he properly is(*r*).

(*)And unless an auctioneer disclose the name of his principal, an action will lie against him for damages on breach of contract(*s*).

Generally speaking, an auctioneer is not liable for interest ; but that subject will be considered fully in the chapter on Interest(*t*).

If an auctioneer do not insert usual clauses in the conditions of sale, whereby the sale of the estate is defeated, he cannot recover any compensation from the vendor for his services : and it is immaterial that he read over the conditions of sale to the seller, who approved of them. The same rule of course applies to negligence generally on the part of the auctioneer, whereby the sale is defeated(*u*).

(*p*) *Yates v. Farebrother*, 4 Madd. 239.

(*q*) *Brown v. Fenton, et c cont.* Rolls, 23 June, 1807, MS. ; S. C. 14 Ves. jun. 144.

(*r*) See 2 H. Blackst. 592 ; 13 Ves. jun. 602 ; 14 Ves. jun. 150 ; *Annesley v. Muggridge*, 1 Madd. 593 ; *Smith v. Lloyd*, 1 Madd. 618.

(*s*) *Hanson v. Roberdeau*, Peake's Ca. 120 ; see *Simon v. Motivos*, 3 Burr. 1921 ; *Owen v. Gooch*, 2 Esp. Ca. 567 ; 12 Ves. jun. 352, 484.

(*t*) *Post.* ch. 10. s. 1.

(*u*) *Denew v. Deverall*, 3 Campb. 451.

(*49)

Where a man is completely the agent of the vendor, a payment to him is in law a payment to the principal ; and in an action against the latter for recovery of the deposit, it is immaterial whether it has actually been paid over to him or not(*v*)(17).

An auctioneer being only an agent, may safely pay over the proceeds of the sale to the seller, his principal, although the latter is to his knowledge in insolvent circumstances(*w*).

It may here be remarked, that a deposit is considered as a payment in part of the purchase-money(*x*), and not as a mere pledge ; which was also the rule of the civil law, where money was given ; but if a ring, &c. was (*)given by way of earnest, or pledge, it was to be returned(*y*).

If, pending a suit for specific performance, a deposit be laid out in the public funds, under the authority of the Court, it will be binding on both vendor and vendee ; and, if laid out without opposition by the seller, it must be presumed to be with his assent ; and, in either case, he must take the stock as he finds it(*z*).

If a purchaser is entitled to a return of his deposit, he is not compellable to take the stock in which it may have been invested, unless such investment were made under the authority of the Court, or with his assent. And an assent will not be implied against a party because notice

(*v*) *Duke of Norfolk v. Worthy*, 1 Camp. N. P. 337.

(*w*) *White v. Bartlett*, 9 Bing. 378 ; S. C. 2 Moo. & S. 515.

(*x*) *Pordage v. Cole*, 1 Saund. 319 ; see *Main v. Melbourn*, 4 Ves. jun. 720 ; *Klinitz v. Surry*, 5 Esp. Ca. 267 ; *Ambrose v. Ambrose*, 1 Cox. 194.

(*y*) *Vinnius*, l. 3. 24.

(*z*) *Poole v. Rudd*, 3 Bro. C. C. 49 ; and see *Doyley v. the Countess of Powis*, 2 Bro. C. C. 32 ; 1 Cox, 206.

(17) See *Taber v. Perrot et al.* 2 Gallis. 565.

(*50)

was given to him of the investment, to which he made no reply(*a*). Therefore, where the deposit is considerable, and it is probable that the purchase may not be completed for a long time, it seems advisable for the parties to enter into some arrangement for the investment of the deposit.

As a vendor will not be subject to any loss by the investment of the purchase-money in the funds without his assent, so he will not be entitled to any benefit by a rise in the funds, although the purchaser gave him notice of the investment; unless he (the vendor) agreed to be bound by the appropriation. Sir William Grant has observed, that a deposit does not impose a liability or responsibility upon the party to whom notice of it is given; throwing upon him any risk as to the principal. The principal remains entirely at the risk of the party making the deposit. He cannot, by depositing the money with his bankers, throw the risk of their credit upon the (*)other parties. They are not called upon to express their opinion of that bank, or to say any thing upon the subject. There is no difference between that and a deposit at the Bank of England, or a conversion of the money into stock; as the one party has no more right to make the other consent to have the fund laid out in stock than in a private bank(*b*).

No objection can be made to the whole of the deposit required by the conditions not being paid by the purchaser, if the vendor, after the sale, agree to accept a less sum(*c*).

Although the deposit be forfeited at law, yet equity will, in general, relieve the purchaser, upon his putting the

(*a*) *Roberts v. Massey*, 13 Ves. jun. 561.

(*b*) *Roberts v. Massey*, *ubi sup*; *Acland v. Gainsford*, 2 Mad. 28.

(*c*) *Hansen v. Roberdeau*, Peake's Ca. 120. See *ex parte Gwynne*, 12 Ves. jun. 378; and 1 Campb. Ca. 427.

(*51)

vendor in the same situation as he would have been in had the contract been performed at the time agreed upon(*d*). But if a bill by a purchaser for a specific performance is dismissed, the Court cannot order the deposit to be returned: as that would be decreeing relief(*e*).

Where the *seller* files the bill he submits to the jurisdiction, and although his bill is dismissed, the Court will compel him to repay the deposit, and with interest, where that ought to be paid. This was first decided by Lord Eldon, and has since been followed by other judges.

It is well settled, that assignees of a bankrupt are not bound to take what Lord Kenyon calls a *damnosa hæreditas*, property of the bankrupt, which so far from being valuable, would be a charge to the creditors; but they may make their election; if, however, they do elect to take (*)the property, they cannot afterwards renounce it, because it turns out to be a bad bargain(*f*). This observation is made as an introduction to a case(*g*), in which it was decided that the assignees of a bankrupt could not be charged as assignees of the lease, where they had not entered into actual possession, but merely put up the property to sale by auction without stating to whom it belonged, or on whose behalf it was sold, and no person bid at the sale: the Court considered this as a mere experiment to enable the assignees to judge, whether the lease were beneficial or not, and compared it to a valuation by a surveyor. If the assignees do accept the property, the bankrupt is by a late

(*d*) *Vernon v. Stephens*, 2 P. Wms. 66; *Moss v. Matthews*, 3 Ves. jun. 279.

(*e*) *Bennet College v. Carey*, 3 Bro. C. C. 390.

(*f*) See 7 East, 342.

(*g*) *Turner v. Richardson*, 7 East, 336; *Wheeler v. Bramah*, 3 Campb. 370; *Copeland v. Stephens*, 1 Barn. & Ald. 593; and see *Carter v. Warne*, 1 Mood. & Malk. 479; S. C. 4 Carr. & P. 191.

act(*h*) relieved from the rent and covenants, and if the assignees decline the same, the bankrupt is not to be liable in case he deliver up the lease to the lessor within fourteen days, and the lessor is enabled in a summary way to compel the assignees to make their election either to accept the same or deliver up the lease and possession of the estate.

Immediately after sale of an estate by auction, an agreement(*i*) to complete the purchase should be signed by the parties or their agent, because sales by auction of estates are within the statute of frauds(*j*); and consequently, the contract could not be enforced against either of the parties who had not signed an agreement(18). Although a man purchase several lots, yet a distinct contract arises upon each lot, and consequently, if no lot is of the value of 20*l.*, no stamp is necessary, although altogether they are of more (*)value(*k*); but they may all be comprised in one agreement.

The above observation, in regard to the necessity of a written agreement, of course, applies to sales by private contract(*l*); as indeed do all the foregoing observations, which are not in their nature applicable exclusively to sales by auction.

(*h*) 6 Geo. IV. c. 16, s. 75. See *ex parte* Pomeroy, 1 Rose, 57; *ex parte* Nixon, 1 Rose, 445.

(*i*) See a form of an agreement, Appendix, No. 5.

(*j*) See *post.* ch. 3.

(*k*) *Emmerson v. Heelis*, 2 Taunt. 38.

(*l*) See *post.* ch. 3. See a form of an agreement, Appendix, No. 6.

(18) It has been decided, that an auctioneer is the authorized agent of the purchaser of land, at auction, to sign the contract of sale for him, as the highest bidder; and that writing his name, as the purchaser, in the memorandum of the sale, by the auctioneer, immediately on receiving his bid and knocking down the hammer, is a sufficient signing of the contract within the statute of frauds. *McComb v. Wright*, 4 Johns. Ch. Rep. 659. See *Davis v. Robertson*, 1 Rep. Con. Ct. 71. *Cleaves v. Foss*, 4 Greenl. 1.

(*53)

As agreements for sale of estates are generally entered into by the attorneys of the parties, it may, in this place, be proper to observe, that where an attorney enters into an agreement on behalf of his principal, the agreement should be made and signed in the name of the principal, by him as attorney: for if an attorney covenant in *his own* name for *himself, his heirs, &c.* he will himself be personally bound, though he be described in the instrument as covenanting for and on the part of his principal(*m*)(19).

Where an estate is sold in lots, whether by public auction or private contract, it may be advisable for the vendor to take attested copies of the parcels included in the different conveyances; in order to satisfy a cautious purchaser of any part of the estate, that no part of the estate bought by him is included in any of the conveyances to the other purchasers.

It may here be observed, that if a man agree to get another so much for his estate, and actually provide a purchaser with whom the owner agrees for the sale of the property, at the sum stipulated, and a deposit is paid, the first agreement will be performed, although the purchaser (*)cannot perform the agreement, if the seller let him off, and retain the deposit as a forfeiture.(*n*)

If an agent for sale of an estate is to be paid a per-

(*m*) *Appleton v. Binks*, 5 East, 148; *Kendray v. Hodson*, 5 Esp. Ca. 228; *Norton v. Herron*, 1 Ry. & Mood. 229; S. C. 1 Carr. & P. 648; *Spittle v. Lavender*, 1 Moore, 270; *Grey v. Gutteridge*, 1 Man. & Ry. 614. See *Duke of Norfolk v. Worthy*, 1 Camp. N. P. 337; *Brown v. Morris*, 2 Taunt. 375.

(*n*) *Horford v. Wilson*, 1 Taunt. 12.

(19) See *Duval v. Craig et al.* 2 Wheat. 45, 56. *Tippels v. Walker*, 4 Mass. Rep. 595. *Thatcher v. Dinsmore*, 5 Mass. Rep. 299. *Fors-ter v. Fuller*, 6 Mass. Rep. 58. *Sumner v. Williams*, 8 Mass. Rep. 162. *Thayer v. Wendall*, 1 Gallis. 37. *White v. Skinner*, 13 Johns. Rep. 307.

centage on the sum obtained, he cannot recover his commission until the money is received by the principal. If therefore it is paid into the bank under an act of Parliament, by the authority of which the property was purchased, the commission is not recoverable until at least the seller's right to the money is ascertained, and it is owing to his wilful default that he has not received it(o).

Where a man had bought an estate and paid a deposit, but the title had not been made out, and being desirous of compromising with his creditors, applied to the seller to cancel the contract and return the deposit, which he refused to do, but said that he would never sue the purchaser on the contract, and thereupon the compromise with the creditors proceeded; it was held that it would have been a fraud in the seller if he had attempted to enforce the contract, and therefore the purchaser was not allowed to recover the deposit, although the title had not been made out(p)(20).

V. By a late act(q), the following duties are imposed upon every valuation or appraisement of any estate, or effects, real or personal, or of any interest therein, or of the annual value thereof; viz. where the amount does not exceed 50*l.*, a duty of 2*s.* 6*d.*; where it exceeds 50*l.* but does not exceed 100*l.*, a duty of 5*s.*; where it exceeds 100*l.* and does not exceed 200*l.*, a duty of 10*s.*; where it exceeds 200*l.* and does not exceed 500*l.*, a duty of 15*s.*; and where it exceeds 500*l.*, a duty of 20*s.*

(o) Bull v. Price, 7 Bing. 237; 5 Moo. & P. 2.

(p) Clark v. Upton, 3 Mann. & Ryl. 89.

(q) 55 Geo. III. c. 148. See Lees v. Burrows, 12 East, 1.

(20) See Treatise on Principal and Agent, (1836) tit. Auctioneers, where all the American cases are abridged.

(*)CHAPTER II.

OF SALES UNDER THE AUTHORITY OF THE COURTS
OF EQUITY.

SECTION I.

*Of the Proceedings from the Advertisements to the
Conveyance.*

WE have already seen, that sales under the decrees of the Court of Chancery, or Exchequer, are not liable to the auction duty ; and therefore if public notice of a vendor's intention to bid for the estate is not necessary, where a single bidder is employed to prevent the estate from being sold at an under-value(*z*), it follows, that *no* notice need be given previously to the sale of an estate under a decree, of the vendor's intention to buy in the estate, if a particular price be not bid for it. At the same time, it must be observed, that where a fraud is committed on the purchaser, by puffing at the sale, it cannot be supported, any more than a sale by auction under similar circumstances(*a*) ; but the Court will, in a proper case, authorize a bidding to be reserved, and to be made one of the conditions of sale(*b*).

Where an estate is directed to be sold before a Master, the particulars of sale are prepared by the plaintiff's solicitor : after they are allowed by the Master, the advertisement for sale must be prepared, either by the plaintiff's solicitor, or by the Master's clerk, and the signature of

(*z*) *Vide Supra*, p. 13.

(*a*) *Vide supra*, p. 24.

(*b*) *Jervoise v. Clark*, 1 Jac. & Walk. 389.

(*)the Master must be obtained to authorize the insertion of the advertisements in the Gazette. There are always two advertisements(c); in the first, no time is appointed for the sale. About three weeks or a month after the insertion of the first advertisement, a warrant must be taken out to fix a time for the sale, and it must be served on all the parties' clerks in court. The warrant being attended, the Master, with the approbation of all parties, will fix the time; and the second advertisement, which is usually called the peremptory advertisement, stating the time, must then be prepared, and inserted in the Gazette(d). The estate may be sold either before the Master; or, if from the situation and nature of the estate, the sale ought not to take place in town, it may be sold in the country before the Master's clerk, or any other person authorized by the Master(e).

The plaintiff's solicitor should attend at the sale, which is conducted in the following manner: The Master's clerk prepares a particular of the lots to be sold, with spaces between each lot. The lots are successively put up at a price offered by any person present, and every bidder must sign his name and the sum he offers, in the space on the particular, under the lot for which he bids; and formerly 2s. 6d. was paid to the Master's clerk for every bidding; but that regulation, which had a tendency to damp the sale, has lately been very properly abolished, and in lieu of the half-crowns, a sum is allowed to the clerk, as part of the expenses attending the sale.(I) The best bidder is of course declared the purchaser. If any

(c) 2 Fowl. Prac. 305.

(d) See 1 Turner's Practice by Ven. 127.

(e) See 2 Fowl. Prac. 305.

(I) This will of course be now corrected under the authority of the late act 3 & 4 W. 4, c. 94.

(*56)

(*)lots are not sold, they must be again advertised for sale(*f*).

The payment of a deposit, and the investment of it in the funds, are governed by the same rules as are adhered to where the contract is between party and party(*g*).

The Court will, on motion, discharge the purchaser, and substitute any other derson in his stead ; but this will not be done unless such person pay in the money, and an affidavit be made that there is no under-bargain ; for the new purchaser may give the other a sum of money to stand in his place, and so deceive the Court(*h*). Formerly the practice seems to have been to require the consent of all the parties in the cause, as well as the consent of the original purchaser(*i*).

If the purchaser resell at a profit behind the back of the Court, before his purchase is confirmed, the second purchaser is considered a substituted purchaser, and must pay the additional price into Court for the benefit of the estate(*j*).

Although more of an estate is sold than is necessary for the purposes of the trust by virtue of which the decree was made, yet the purchaser can make no objection to it, the decree being a sufficient security to him, as it cannot appear but that it was right to sell the whole. If, however, the decree were, that the Master should sell Greenacre, and he sells Blackacre, an objection to the sale would be good(*k*) ; although it seems that it may be laid down as a general rule, that a purchaser shall not (*)lose the benefit of his purchase by any irregularity of

(*f*) See 1 Turn. Prac. 129 ; 2 Fowl. Prac. 306, 307.

(*g*) *Vide supra*, p. 50 ; Ambrose v. Ambrose, 1 Cox, 194.

(*h*) Rigby v. M'Namara, 6 Ves. jun. 515 ; Vale v. Davenport, 6 Ves. jun. 615.

(*i*) Matthews v. Stubbs, 2 Bro. C. C. 291.

(*j*) Nodder v. Ruffin, 1 Taunt. 341.

(*k*) Lutwych v. Winford, 2 Bro. C. C. 248.

the proceedings in a cause(*l*). If a decree is obtained by fraud, it may, of course, be relieved against(*m*); and it has been said that a purchaser is bound to see, that, at least as far as appears on the face of the proceedings before the Court, there is no fraud in the case(*n*); but, if the Court itself be imposed upon, it would be a strong measure to *imply* notice of the fraud to the purchaser, from the very proceedings before the Court. But it is a settled maxim that persons purchasing under decrees of the Court are bound to see that the sale is made according to the decree(*o*)(21).

(*l*) Lloyd v. Johnes, 9 Ves. jun. 37; Curtis v. Price, 12 Ves. jun. 89; Bennett v. Harnell, 2 Scho. & Lef. 566; Burke v. Crosbie, 1 Ball & Beat. 489; Lightburne v. Swift, 2 Ball & Beat. 207. See Baker v. Morgan, 2 Dow, 526. Mullins v. Townsend, 1 Dow & Clark, 430.

(*m*) Kennedy v. Daly, 1 Schoales & Lefroy, 355; Giffard v. Hort, *ib.*

(*n*) Gore v. Stacpole, 1 Dow, 30.

(*o*) Colclough v. Sterum, 3 Bligh, 181.

(21) In Reed v. Carter, 1 Black. Indiana R. 410, where the sheriff sold under an execution, land valued at 1500 dollars or upwards for 351 dollars, under the following circumstances: viz. the debtor had previously paid the amount supposed to be due to the sheriff, and promised to pay the residue (if any) when called on. There was a balance left of 15 or 20 dollars; and for this balance the sheriff sold without calling on the debtor: but the court observed that a court of law could not interfere on motion; but relief might be obtained in chancery for such an abuse of power. See Tiernan v. Wilson, 6 J. Ch. 411, where it was held that the sheriff should sell only so much of the defendant's property as might be sufficient for the purpose, provided it can be sold separately.

Where the execution is issued on a judgment for an amount exceeding the *ad damnum* in the writ; and the levy is made for the full amount; the levy is void in respect to other attaching creditors; and also in respect to persons claiming title by intermediate conveyance. And it seems to be considered that there can be no apportionment in such case, so as to give the creditor a title to the property correspond-

A person having a legal lien, as a judgment-creditor not coming in under the decree, would not be bound by it, and might proceed against the purchaser, unless he obtained a legal interest over-reaching the lien; in which case the claim being merely in equity, the Court would protect the purchaser buying under its decree(*p*), or rather would not lend its aid to the judgment-creditor against him(22).

(*p*) *Barrett v. Blake*, 2 Ball & Beat. 354.

ing in value to his attachment. *Chickering v. Lovejoy*, 13 Mass. 56. If the judgment, however, be for a penalty, the plaintiff may levy his whole debt independent of the charges of execution. Per Parsons, C. J. 4 Mass. 411. In a late case, it was held, that where the execution was levied upon land; and the appraisers valued the land 14 cents more than the amount of the execution, the extent was not invalid for this cause; for *de minimis non curat lex*. *Spencer v. Champion*, 9 Conn. R. 453.

In *Den v. Despereaux*, 9 Hals. R. 182, it was held, that where the sheriff's deed misrecites the execution, the purchaser will fail to show the authority of the sheriff to sell. So, in *Den v. Whright*, Pet. 66, U. S. C. C., the court held, that the sheriff's deed could not be given in evidence without producing the judgment and execution; these being necessary to show the authority of the sheriff; and if the latter differ from the former, it is the same as if none were produced. It is different in New-York; the statute in the latter state not requiring the execution to be recited in the deed. 9 Cowen, 192; S. P. 10 Johns. 331.

(22) In the late case of *The Eagle Fire Ins. Co. v. Cammet et al.*, 2 Edw. Ch. R. 127, the V. Ch. discharged a purchaser from his contract under a decree of foreclosure of a mortgage, on the ground, that the remainder man, who had the first estate of inheritance had not been made a party. The widow and daughter of the mortgagor were the only parties: and they were tenants for life only under the will of the mortgagor. This was not sufficient. In *Gore v. Stackpole*, 1 Dow's P. R. 18, a foreclosure, in a similar case, was opened by a remainder man fifty years afterwards. It was done upon the opinions of Lords Redesdale and Eldon.

In *Foster v. Briggs*, 3 Mass. 315, where the plaintiff made an attachment of land, which was under an incumbrance to its full value.

In sales by auction or private agreement, the contract is complete when the agreement is signed ; but a different rule prevails in sales before a Master ; the purchaser is not considered as entitled to the benefit of his contract till the Master's report of the purchaser's bidding is absolutely confirmed ; and I shall now proceed to show (*)what steps a purchaser must take to obtain an absolute confirmation of the Master's report(23).

The purchaser must first, at his own expense, procure a report from the Master, of his being the best bidder for the lot he has purchased. After the report is filed, and an office-copy of it taken by the purchaser, he must, at his own expense, apply to the Court by motion, of which no notice need be given(*q*), that the purchase may be confirmed. Upon this application the order will be confirmed *nisi*(*r*), that is, unless cause be shown against the same in eight days after service. The purchaser must, at his own expense, procure an office-copy of this order from the Register(*I*). If no cause be shown within the eight days, the purchaser must, at his own expense, apply to the Court to confirm the report absolutely, which will

(*q*) See Parker's Analysis, 141.

(*r*) For a form of the order, see 2 Fowler's Pract. 308.

(*I*) See 3 & 4 W. 4, c. 94, s. 10.

Four days after he assisted in a negotiation by which the incumbrance was removed ; and the premises sold to one G. under whom the defendant claimed. Parsons, C. J. "Whether at this time (the time of sale) his not disclosing his attachment, but assisting in the transaction was such a fraud upon G., as shall, at law, defeat his attachment, it is not necessary now to decide, as the justice of the case can be attained by the decision of another question. I am satisfied that, were we sitting here as a court of Chancery, with all the equitable powers of that court, we ought to set aside the plaintiff's attachment, on account of his fraudulent concealment of it disclosed in the case."

(23) See *Monell v. Lawrence*, 12 Johns. Rep. 521. *contra*.

(*59)

be done of course(s), on an affidavit of the service of the order(t), and a certificate of no cause having been shown. The certificate is obtained from the Register by application to the entering clerk, and leaving the order nisi the day before. Notice of this application need not be given(u). But if he be served with notice of a motion to open the biddings, he cannot regularly proceed to confirm his report absolutely(x).

If after having obtained the order nisi, the purchaser neglects to confirm the order, the vendor himself may make the motion(y).

The bidder not being considered as the purchaser (*)until the report is confirmed, is not liable to any loss by fire or otherwise which may happen to the estate in the interim(z); nor is he, until the confirmation of the report, compellable to complete his purchase(a); but upon the report being confirmed, he will be compelled to carry the contract into execution(b).

If the purchaser neglect to complete his purchase, the practice is, to confirm the report, and then if the purchaser is supposed to be responsible, to get an order to inquire whether the party can make out a good title(c), and if he can, to obtain an order upon the purchaser to complete

(s) For a form of the order, see 2 Fowler's Pract. 311.

(t) For forms of the affidavit, see 2 Turn. Pract. 503. 522; Parker's Anal. 98; 2 Fowl. Pract. 310.

(u) See 1 Turn. Pract. 129.

(x) Vansittart v. Collier, 2 Sim. & Stu. 608.

(y) Chillingworth v. Chillingworth, 1 Sim. & Stu. 291.

(z) *Ex parte* Minor, 11 Ves. jun. 559; see 13 Ves. jun. 518; 1 Jac. & Walk. 639.

(a) Anon. 2 Ves. jun. 335.

(b) Barker v. Holford, and Eggington v. Flavel, 2 Anstr. 344, cited.

(c) Notice must be given of the motion for this order. For a form of the notice, see 2 Turner, 650.

his purchase(*d*)(I); but if the purchaser is unable to complete his purchase, then on the report being confirmed, it is moved to discharge him from the bidding(*e*), and notice of this motion must be given to the purchaser(*f*). But a purchaser will not be permitted to baffle the Court; and therefore, instead of discharging the purchaser from his bidding, the Court will, if required, make an order that he shall, within a given time, pay the money, or stand committed(*g*)(24).

(*d*) See 2 Fowl. Pract. 318, 325.

(*e*) Cunningham v. Williams, 2 Anstr. 344.

(*f*) For a form of the notice, see 2 Turn. Pract. 651.

(*g*) Lansdown v. Elderton, 14 Ves. jun. 512.

(I) A motion was made before Lord Erskine, that the purchase-money should be paid in by the purchaser. The purchaser did not appear. After consulting the Register, who had searched for precedents, and expressing his unwillingness to do any thing to prejudice sales by the Court, the Chancellor refused the motion, but ordered the title to be referred to the Master; and then, he said, if a good title could be made he would compel payment of the money according to the usual practice. Anon. Ch. 22d July, 1806, MS.

(24) A purchaser cannot object to any defect of title at a sheriff's sale, of which he had notice. Therefore, where lands were taken in execution; and at the time of sale by the sheriff one H. F. gave public notice that the land was his, and not the execution debtor's: held, that the vendee could not avail himself of such defect in the title as a defence against paying the purchase money. (Friedly v. Scheetz, 8 S. & R. 268.)

Duncan, J. in delivering the judgment of the court said "the sheriff conveys to the purchaser a free and clear estate, as fully and amply, as they were in the debtor. He enters into no covenant. Inadequacy of price alone is no objection to a sale under process of law. 11 Johns. 555. The rule of *caveat emptor* is binding on every purchaser at a sheriff's sale. Fraud, a clear mistake in the description of the property, its situation, its dimensions, would raise a different question. The learned judge added in conclusion in respect to a resale that, "the court were not called upon to give an opinion;" but said, "here the resale

(*)When the report is absolutely confirmed, the purchaser is entitled to a conveyance on payment of the purchase-money, and may, after giving notice of his intention(*h*), apply to the Court for leave to pay his purchase-money into the Bank(*i*), and to be let into possession of the estate; but this application should of course not be made-until the title be approved of(*k*). When the money is paid according to the order, the purchaser must, at his own expense, obtain a certificate of the payment of it.

If the estate be subject to an incumbrance, which appears upon the report, the purchaser should, after giving notice of his intention(*l*), apply to the Court for leave to pay off the charge, and to pay the residue of the purchase-money into the Bank. But where an incum-

(*h*) For forms of the notice, see 2 Turn. Pr. 647; Park. Anal. 140.

(*i*) For the mode of paying the money into the Bank, see 1 Turn. Pract. 210; and for a form of the order, see 2 Fowl. Pract. 313.

(*k*) See 2 Fowl. Pract. 317.

(*l*) For a form of such notice, see 2 Turn. Pract. 648.

was at the risk of the purchaser, and on a resale made by a sheriff for the purchaser's non-compliance, the purchaser would not be entitled to any surplus, though he would be accountable for any deficiency." But where the resale is on account of the purchaser, it is different. The case of *Webster et al. v. Hoban*, 7 Cranch, 399, was an action on the sale itself; and the condition of the sale was, that the purchaser should secure the purchase money within 30 days; and in default of so doing the property was to be resold on his account. The court held, that the purchaser was clearly entitled to the surplus. In respect to the case first cited, it may be observed that, "if the defendant had not given the obligation, the sheriff might have returned the property to the next bidder, sold again, and have sued for the difference; or he might have made a special return, that the premises were knocked down to the defendant, and that he not having paid the purchase money, therefore the premises remained unsold." *Tantinger v. Pole*, 1 Dall. 458. Or, he might as he did in that case, return them sold, tender the conveyance, and sue for the purchase-money on the obligation.

brance on the estate does not appear on the report, and any of the parties refuse, or are incompetent to consent, a purchaser cannot apply any part of his purchase-money in discharge of the incumbrance, though perhaps, if the parties be all competent to consent, and do consent, it may be done(*m*).

Where two or more persons purchase one lot, the money must be paid altogether; the Court will not allow them to pay their proportions separately, on account of the confusion which might ensue(*n*).

A purchaser under a decree is entitled to be let into possession of the estate from the quarter-day preceding his purchase, paying his money before the following (*)one(*o*). But this rule does not apply to a colliery, which is considered as a trade. The profits are settled monthly, and therefore the purchaser is entitled to the profits only from the commencement of the month in which he purchased, paying his purchase-money in the course of that month(*p*).

If a life interest in stock be sold, the purchaser is entitled to the dividend which becomes due after the sale, although it falls due the very day after(*q*).

A purchaser is not entitled to the rents for a period beyond the quarter-day preceding the payment of his money, merely because he has been ready to complete his purchase, and had his money ready lying dead in a banker's hands; for he might have moved to pay the money into Court, when it would have been laid out:

(*m*) — *v. Stretton*, 1 Ves. jun. 266.

(*n*) *Darkin v. Marye*, 1 Anst. 22.

(*o*) *Twigg v. Fifield*, 13 Ves. jun. 517; see *Garrick v. Earl Camden*, 2 Cox, 231; *vide post*. ch. 10.

(*p*) *Wren v. Kirton*, 8 Ves. jun. 502; *Williams v. Attenborough*, 1 Turn. 70.

(*q*) *Anson v. Towgood*, 1 Jac. & Walk. 637.

(*62)

and this, if done by special application, would not have been an acceptance of the title(r).

If a purchaser enter into possession, he will be compelled to pay the money into Court, although he entered with the permission of the parties in the cause. The Court only can give such permission(s).

When the report is absolutely confirmed, and every thing arranged, the draft of the conveyance must be drawn by the purchaser's solicitor, and either settled by the Master, if the parties insist upon it, or, which is more customary, by a conveyancing counsel of whom the Master approves. Sufficient time must be allowed for copies to be made for such parties in the cause as require (*)them, and then warrants must be taken out to proceed on the draft. The Master's clerk will, at the purchaser's expense, ingross the deed, procure the report or certificate of its being allowed, and then deliver the deeds to the purchasers; and it is usual to obtain the Master's signature to every skin. The report must be filed, and an office-copy of it taken(t).

It is usual, however, to so word decrees, that the draft shall not go before the Master *unless the parties differ*. Where this mode is adopted, the business is transacted in the same way as upon a sale by private contract, unless the parties cannot agree, in which case, resort is had to the Master.

When the deeds have been properly executed by all necessary parties, an affidavit of the due execution of them must be made, and filed in the affidavit office, and an office-copy of the affidavit must be taken: this being done, the money directed to be paid in consequence thereof, may be procured in the usual manner(u).

(r) *Barker v. Harper*, Coop. 32.

(s) *Anon. L. I. Hall*, 16 July 1816, MS.

(t) 1 Turn. Pract. 145.

(u) 1 Turn. Pract. 145.

If the parties disagree as to the necessary parties, &c. to the conveyance, the Master will report his approbation of the draft, as settled by him. To this report exceptions may be taken(*x*), and then the question will come before the Court in a regular way.

So if the parties differ as to the validity of the title to the estate, the Master must make his report upon the title, to which exceptions may in like manner be taken(*y*).

If the title prove bad, the purchaser will be paid the costs of the reference out of the funds in the cause(*z*); (*)and if there are no funds in Court, the plaintiff will in a common case be ordered to pay the purchaser his costs in the first instance(*a*).

In a case where there was error in the decree under which the estate was sold, the purchaser was discharged, upon motion, from his purchase, although the parties were proceeding to rectify it(*b*).

If a purchaser of an estate under a decree of the Court, after the absolute confirmation of the report, and before any conveyance made to him, die, having devised his interest therein, the Court will order a conveyance to be made to the devisees, without the consent of the testator's heir at law, where he is an infant(*c*).

If an estate directed to be sold before a Master, is sold by private contract, or in any other manner contrary to the order of the Court, and not actually conveyed to the purchaser, the Court will not take notice of the sale, but will direct the estate to be sold before the Master, accord-

(*x*) *Lloyd v. Griffith*, 1 Dick. 103; *Tipping v. Gartside*, 2 Fowl. Pract. 328; *Wakeman v. Duchess of Rutland*, 3 Ves. jun. 504.

(*y*) For forms of exceptions, see 2 Turn. Pract. 589.

(*z*) *Reynolds v. Blake*, 2 Sim. & Stu. 117.

(*a*) *Smith v. Nelson*, 2 Sim. & Stu. 557.

(*b*) *Lechmere v. Brasier*, 2 Jac. & Walk. 287.

(*c*) *The King v. Gregory*, 4 Price, 380.

(*64)

ing to the decree(*d*)(25). And a person who has notice of the decree cannot be advised to purchase the estate unless it be sold before the Master(*e*): and the money should be paid into court and not to the party(*f*).

If an estate be sold contrary to the order of the Court, and the purchaser had notice of the decree, he will have no remedy(26); but if he bought without notice, he may recover at law for breach of the agreement(*g*).

A sale before a Master is not within the statute of frauds, and after confirmation of the Master's report of the (*)best purchaser, the sale will be carried into effect even against the representative of the purchaser, although he did not subscribe; the judgment of the Court taking it out of the statute(*h*).

And even if the authority of an agent not being admitted cannot be proved, yet if the Master's report could be confirmed, the sale would be carried into execution unless some fraud were proved(*i*).

As a purchaser under a decree does by the act of purchase submit himself to the jurisdiction of the Court, he may, if he obtain possession of the estate before the con-

(*d*) *Annesley v. Ashurst*, 3 P. Wms. 282. See and consider *ex parte Hughes*, 6 Ves. jun. 617.

(*e*) See 2 vol. Ca. and Opin. 224, 225.

(*f*) See 2 Scho. & Lef. 581.

(*g*) *Raymond v. Webb*, Lofft, 66 : See *Mortlock v. Buller*, 10 Ves. jun. 314.

(*h*) *Att. Gen. v. Day*, 1 Ves. 218.

(*i*) *Ibid*.

(25) Sales of mortgaged lands, under a decree, must be made by a master, or under his immediate direction. A sale by a person deputed for the purpose by a master, in his absence, is irregular, and will be set aside. *Heyer v. Deaves*, 2 Johns. Ch. Rep. 154.

(26) See *Quarles v. Lacy*, 4 Munf. 251.

tract is completed, be restrained by injunction from committing waste(*j*).



SECTION II.

Of opening the Biddings, and of rescinding the Contract.



THUS far we have traced a sale before a Master where no opposition is made to the absolute confirmation of the Master's report of the best bidder, and the sale is regularly concluded. But where estates are sold before a Master under the decree of a court of equity, the Court considers itself to have a greater power over the contract than it would have were the contract made between party and party(*k*) ; and as the chief aim of the Court is to obtain as great a price for the estate as can possibly be got, it is in the habit of opening the biddings after the estate is sold(27). It seems to have been thought that the

(*j*) *Cassamajor v. Strode*, 1 Sim. & Stu. 381.

(*k*) See 1 P. Wms. 747.

(27) See *Fairfax v. Muse's Exrs.* 4 Munf. 124. *Ford v. Herron*, 4 Munf. 316. *Wood's Exr. v. Hudson*, 5 Munf. 423.

In the State of *New-York*, the *English* practice of opening biddings at a master's sale, is not adopted : But where the executors of a mortgagee were innocently misled, and induced to believe, that the sale of the premises would not take place on the day appointed, and there being no culpable negligence on their part, the court, under the special circumstances of the case, set aside the sale, and ordered a re-sale, on condition that the defendant should pay the purchaser all his costs and expenses, and the costs of the application, though the sale was perfectly fair. *Williamson v. Dale*, 3 Johns. Ch. Rep. 290. See *Lansing v. M'Pherson*, 3 Johns. Ch. Rep. 424.

(*66)

(*)same rule may be extended to sales under a commission of bankruptcy(*l*). This, however, never has been done, nor is there any reason to apprehend that so mischievous an extension of the rule will ever take place.

Where a person is desirous of opening a bidding, he must, at his own expense, apply to the Court, by motion for that purpose, stating the advance offered. Notice of the motion must be given to the person reported the purchaser of the lot, and to the parties in the cause(*m*). If the Court approve of the sum offered, the application will be granted, and on the order being drawn up, entered and served, a new sale must be had before the Master. The order is made at the expense of the person opening the biddings, and he must bear the expense of paying in his deposit, and pay the costs of the first purchaser(*n*), and interest at the rate of 4*l.* per cent. on such part of the purchase-money as the Master shall find to have lain dead(*o*).

Mere advance of price, if the report of the purchaser being the best bidder is not absolutely confirmed, is sufficient to open the biddings, and they will be opened more than once, even on the application of the same person, if a sufficient advance be offered(*p*); but the Court will stipulate for the price, and not permit the biddings to be opened upon a small advance(*q*); and, although an advance of 10 per cent. used generally to be considered suffi-

(*l*) *Ex parte* Partington, 1 Ball & Beatty, 209.

(*m*) For a form of the notice, see 2 Turn. Pract. 649, 650.

(*n*) 2 Fowl. Pract. 318; 1 Turner's Pract. 131.

(*o*) This was directed on opening the biddings for Gen. Birch's estate, MS.

(*p*) *Scott v. Nisbitt*, 3 Bro. C. C. 475; *Hodges v. Jones*, 2 Fowl. Pract. 318; see *Baillie v. Chaigneau*, 6 Bro. P. C. by Toml. 313; *Preston v. Barker*, 15 Ves. jun. 140.

(*q*) *Anon.* 1 Ves. jun. 453; *Anon.* 2 Ves. jun. 487; *Upton v. Lord Ferrers*, 4 Ves. jun. 700; and *Anon.* 5 Ves. jun. 148.

(*)cient on a large sum, yet no such rule now prevails(*r*); but in the case of a sale under a creditor's suit, the Court permitted the biddings to be opened, upon an advance of 5 per cent on 10,000*l.*(*s*). An advance of 350*l.* upon 5,300*l.* was refused, and it was said that the former cases only established that where an advance so large as 500*l.* is offered the Court will act upon it, though it be less than 10 per cent(*t*). Biddings, it seems, will not be opened unless 40*l.* at least be offered in advance(*u*); and the common rule does not apply to a colliery(*w*).

The determinations on this subject assume a very different aspect when the report is absolutely confirmed. Biddings are in general not to be opened after confirmation of the report(*x*): increase of price alone is not sufficient, however large, although it is a strong auxiliary argument where there are other grounds.

In a case(*y*), however, before Lord Rosslyn, this rule, although so frequently acknowledged and acted upon, was not attended to, but biddings were opened after the report was absolutely confirmed, merely on an advance of price. This case is now completely overruled.

But very particular circumstances may perhaps induce

(*r*) *Andrews v. Emerson*, 7 Ves. jun. 4; *White v. Wilson*, 14 Ves. jun. 151. See *Anon.* 3 Madd. 494.

(*s*) *Brooks v. Snaith*, 3 Ves. & Bea. 144.

(*t*) *Garstone v. Edwards*, 1 Sim. & Stu. 20; *Lefroy v. Lefroy*, 2 Russ. 606.

(*u*) *Farlow v. Weildon*, 4 Madd. 460; *Brookfield v. Bradley*, 1 Sim. & Stu. 23.

(*w*) *Williams v. Attenborough*, 1 Turn. 70.

(*x*) 2 Ves. jun. 53; *Scott v. Nisbitt*, 3 Bro. C. C. 475; *Boyer v. Blackwell*, 3 Anstr. 656; *Prideaux v. Prideaux*, 1 Bro. C. C. 287; 2 Ves. jun. 53; 1 Cox, 35.

(*y*) *Chetham v. Gurgeon*, 5 Ves. jun. 86; and see his Lordship's decision in *Prideaux v. Prideaux*, *ubi sup.* when Lord Commissioner.

(*67)

the Court to open the biddings after confirmation of the report, if the advance be considerable(I).

(*) Thus, in a case(z) where the owner of the estate (who joined in a motion for the purpose of opening biddings after the report was absolutely confirmed) was in prison at the time of the confirmation, and it appeared that he would have opened the biddings before confirmation of the report, had he been able, and had even directed persons to bid more than what the estate sold for, who deceived him, and an advance of 4,000*l.* (being more than one fourth of the original purchase-money) was offered, the biddings were opened on the deposit of the 4,000*l.* being made.

Strong as the circumstances in this case were, Lord Eldon, in a late case, expressed great disapprobation of the decision, and determined generally, that after a purchaser has confirmed his report, unless some particular principle arises out of his character, as connected with the ownership of the estate, or some trust or confidence, or his own conduct in obtaining his report, the bidding ought not to be opened (a).

And Lord Redesdale, also, in a case before him, held that biddings could not be opened after the report was absolutely confirmed, unless on the ground of fraud on the part of the purchaser. And he considered it to the advantage of suitors to observe greater strictness in opening biddings, as it would procure better sales(b).

(z) *Watson v. Birch*, 2 Ves. jun. 51 ; 4 Bro. C. C. 172.

(a) *Morice v. the Bishop of Durham*, 11 Ves. jun. 57.

(b) *Fergus v. Gore*, 1 Schoales & Lefroy, 350.

(I) In Ireland, a sale under a decree was actually set aside after the purchaser was put in possession, and the conveyance to him executed and registered, because another person offered 200*l.* more than the purchaser had paid. *Conran v. Barry*, Vern. and Scriv. 111. See *Ex parte Partington*, 1 Ball and Beatty, 209.

In a still later case, Lord Eldon adhered to the same rule, and said that he could not do a thing more mischievous to the suitors than to relax further the binding nature of contracts in the Master's office : half the estates (*) that are sold in the Court being thrown away upon the speculation that there will be an opportunity of purchasing them afterwards by opening the biddings(c).

Fraud will, of course, be a sufficient ground for opening the biddings. Therefore, if the parties agree not to bid against each other(d), or a survey be made of an estate with some degree of collusion with the tenants(e), and it misrepresents the value and quality of the estate, and some of the purchasers are aware of this fraud in making the survey, and the owner is ignorant of it ; or the purchaser of the estate be partner with the solicitor of the cause, and is in possession of some particular knowledge to the benefit of which the other parties were entitled(f); in all these cases the Court would open the biddings, although the report had been absolutely confirmed.

Where the biddings are opened, the advance is ordered to be deposited immediately(g), and the costs of the purchaser to be paid by the persons opening the biddings(h); but the Court will not direct the Master to allow a specific expense(i).

If the biddings are opened, the estate may be allotted for sale in a different manner to what it at first was(j).

(c) *White v. Wilson*, 14 Ves. jun. 151.

(d) See 2 Ves. jun. 52.

(e) *Ryder v. Gower*, 6 Bro. P. C. 148 ; and see 2 Ves. jun. 53.

(f) *Price v. Moxon*, July 14, 1754, before Lord Hardwicke. See 6 Bro. P. C. 155 ; 2 Ves. jun. 54.

(g) *Anon.* 6 Ves. jun. 513.

(h) See *Watts v. Martin*, 4 Bro. C. C. 113 ; and see *ibid.* 178 ; *Upton v. Lord Ferrers*, 4 Ves. jun. 700.

(i) *Anon.* 1 Ves. jun. 286.

(j) *Watts v. Martin*, 4 Bro. C. C. 113.

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As the biddings are opened for the benefit of the suitor, no other person will be favored in that respect.

Thus, upon a motion to open a bidding of 5,020*l.*(*k*) upon the ground of mistake as to the time of sale, and an over-bidding of 150*l.*; the Lord Chancellor refused it, (*)saying, he would not open it for a less sum than 500*l.* and that the circumstance that the bidder was too late was no ground at all.

The person who is desirous of opening the biddings having been present at the sale, is no objection to their being opened, although a greater advance may, on that account, be required(*l*). Nor is it material that the applicant is entitled to a part of the produce of the estates(*m*).

A man opening the biddings on behalf of a person not in existence, will himself be decreed to be the purchaser(*n*).

Where a person is permitted to open the biddings upon the usual terms, paying the costs, and making a deposit, and the estate is bought by another person, the person opening the biddings is entitled to take back his deposit; but he is not entitled to an allowance for his costs, as they are in the nature of a premium paid by him for the opportunity of bidding(*o*).

Under special circumstances, however, they might be allowed. If a person come forward for the benefit of the

(*k*) Anon. 1 Ves. jun. 453.

(*l*) Rigby v. M'Namara, 6 Ves. jun. 117. See Tait v. Lord Northwick, 5 Ves. jun. 555; see 15 Ves. jun. 14; and see M'Culloch v. Cotbach, 3 Madd. 314, where the Vice-Chancellor ruled *contra*; but the rule is established by Thornhill v. Thornhill, 2 Jac. & Walk. 347; Pearson v. Pearson, 13 Price, 213; Tyndale v. Warre, 1 Jac. 525; Lefroy v. Lefroy, 2 Russ. 606.

(*m*) Hooper v. Goodwin, Coop. 95.

(*n*) Molesworth v. Opie, 1 Dick. 289.

(*o*) Rigby v. M'Namara, 6 Ves. jun. 466; Earl of Macclesfield v. Blake, 8 Ves. jun. 214; Trefusis v. Clinton, 1 Ves. & Beam. 361.

family, and the estate at the first sale was knocked down by mistake, or sold at a great under-value, he will be allowed his expenses(*p*).

It seems, that if a person purchase several lots of an (*)estate, and the biddings are opened as to one, he shall have an option to open them all(*q*).

In two late cases the distinction was taken that where the lots, the biddings for which are sought to be opened, were purchased before the other lots bought by the same purchaser, he is entitled to have the biddings opened as to *all* the lots(*r*).

If a purchase be rescinded, and the purchaser has paid his money into court, and it has been laid out *upon his application*, he is to take back the stock, whether the funds have fallen or risen since the investment(*s*).

The authority which the Court has over these contracts enables it in a proper case to relieve the purchaser as well as the suitor.

Therefore, where the contract is inequitable, the purchaser, on submitting to forfeit his deposit, will be discharged from his purchase(*t*). Where, however, the contract is not inequitable, a purchaser must proceed in his purchase, and will not be permitted to forfeit his deposit, and abandon the contract, however disadvantageous it may be.

Thus, on an application to the Court by the persons who opened the biddings for General Birch's estate(*u*), to forfeit their deposit, which was resisted by the creditors

(*p*) *Earl of Macclesfield v. Blake, ubi sup.*; *Owen v. Foulks*, 9 Ves. jun. 348; *West v. Vincent*, 12 Ves. jun. 6.

(*q*) See 2 Anstr. 657; *ex parte Tilsley*, 4 Madd. 227. n.

(*r*) *Price v. Price*, 1 Sim. & Stu. 386.

(*s*) *Hodder v. Ruffin*, V. C., 21 Mar. 1825, MS.

(*t*) *Savile v. Savile*, 1 P. Wms. 745.

(*u*) MS.; and see *Sewell v. Johnson*, Bumb. 76.

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for whose benefit the estate was sold; the Court held the purchasers to their bargain, and would not permit them to rescind the contract, although they had given a price which was considered much beyond the value of the estate.

(*)But where the purchaser has by *mistake* given an unreasonable price for the estate, the Court will in a proper case wholly rescind the contract.

This equity was enforced in the case of *Morshead v. Frederick*(*w*), where it appeared that Smiths, the bankers, were tenants in possession of the house in question, for which *they* paid two rents, one a ground rent of 56*l.* to the defendant, and the other an improved rent of 210*l.* to a third person. The house was directed to be sold, under a decree; and the plaintiffs, by a broker, treated for the purchase of it, and employed him to value it. The broker had an interview with the attorney concerned in the sale, who stated, that the rent payable for the house was the 56*l.* and the broker valued the estate accordingly. A written agreement was not entered into, but the contract was approved of by the Master, and the money paid into the Bank. The purchasers then moved the Court to rescind the contract, on the ground of mistake, and the broker proved that the purchasers had not informed him of the rent of 210*l.*; and that he was ignorant of the existence of it at the time he made his valuation: and the Court ordered the purchase-money to be repaid, and rescinded the contract. This, however, may be considered a strong case. It might be argued that the purchasers' only equity was their own negligence.

Although the solicitor in the cause buy in an estate merely to prevent a sale at an undervalue, yet if he act without authority he will not be discharged from his

(*w*) Ch. 20 Feb. 1806, MS. App. No. 10.

purchase. Lord Eldon has said, that it would be a very wholesome rule to lay down, that the solicitor in the cause should have nothing to do with the sale ; as the certain (*)effect of a bidding by the solicitor in the cause is that the sale is immediately chilled(*x*).

The same rule has been applied to assignees of a bankrupt, who, without authority, bought in an estate ordered to be sold by the Court upon a petition of a mortgagee(*y*).

It may be observed, in this place, that if a bankrupt's estate be sold, and the purchaser pay a deposit, and then the commission is superseded, the Lord Chancellor will, upon petition, order the deposit to be returned, without driving the purchaser to file a bill(*z*).

Where a person bought under the decree for another who died without having adopted the contract, although an order *nisi* to confirm the purchase in his name had been obtained, the Court refused to order the executors of the purchaser to pay the purchase-money, and the heir declining the purchase, the order *nisi* was set aside, and a re-sale ordered, and the consideration as to any deficiency that might arise on the re-sale, and by whom the costs of it were to be repaid, were reserved ; it was held that the executors, in a purchase by their testator from the Court, would not be compelled by the heir to pay for the estate without filing a bill(*a*).

If an extended estate be sold under the 25 Geo. 3, c. 35, and the sale be confirmed by the Remembrancer's report, and the usual orders, yet where a good title cannot be made, the court of Exchequer will, upon the

(*x*) *Nelthorpe v. Pennyman*, 14 Ves. jun. 517.

(*y*) *Ex parte Tomkins*, Ch. 23d Aug. 1816, MS. App. No. 12.

(*z*) *Ex parte Fector*, 1 Buck, 428.

(*a*) *Lord v. Lord*, 1 Sim. 503.

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motion of the Crown, discharge the purchaser without payment to him of any costs incurred in investigating the title, or in procuring the reports(b)(28).

(b) *Rex v. Cracroft*, 1 M'Clel. & You. 460.

(28) The case of *Lawrence v. Monell*, 12 Johns. 521. was thus : The respondent Lawrence holding a mortgage against one Sackett ; and the defendant Monell having two judgments against Sackett ; and the defendant, Wood, having a deed of the mortgaged premises, from Sackett, in trust for all his creditors, the respondent filed his bill to foreclose the mortgage ; upon which the parties entered into an agreement that the premises should be sold under the direction of a master in Chancery, and the proceeds paid into court ; out of which Lawrence was to be paid ; and the rights of M. W. & S. preserved respectively. A decree was made pursuant to this agreement ; and the master advertised the sale. Before the sale, the interest of Sackett was sold under an execution in favor of one G. ; but of the judgment on which it issued Monell had become the owner ; and became the purchaser at the Sheriff's sale. The object of Monell in this was to overreach the deed to Wood in trust ; because G.'s judgment was prior to the latter deed ; but the latter deed was prior to Monell's last judgment. Monell then paid Lawrence his mortgage merely taking a receipt. "Received from Mr. Geo. Monell one of the defendants in this cause; 3,932 & 90." This payment was considered by the solicitor of the mortgagee only as a deposit until the sale by the master had been made : for so indeed the solicitor of the mortgagee testified. Monell then applied to dismiss the bill under which a sale had been ordered, but this being denied, the sale by the master took place, the sale confirmed : held, that a sale by an officer of the court, will not be set aside ; but the rights of *bona fide* purchasers, under such sale, will be protected. Yeates, J. said that "The English rule, requiring a confirmation of the master's report was not applicable here. In England, proceedings are different : the master opens a book for biddings, and all remains in an unfinished state, and under the perfect control of the court, until the report of sales is confirmed. The master, there, has no authority to execute a conveyance ; that is done by the parties in interest only ; and until a confirmation of his report ; the whole of the business, in relation to the biddings transacted before him, continues open for the exercise of the discretion of the court. Here, the confirmation of the master's report, before the deeds are executed, is not essential ; it has been rendered unnecessary by the statute, in giving the master

authority to convey to the purchasers. The confirmation of the report, if the sale has been fairly conducted, is of course. And Thompson, J. added in conclusion, "There has been no suggestion that the decree by consent was obtained by fraud or imposition, or that the mortgaged premises were not sold for their full value; and he (Monell) is now seeking to set aside this sale, made pursuant to his own agreement, for the purpose of vesting in himself, solely, the title, and to prevent the equitable distribution of the surplus among the creditors of Sackett. The order of the Chancellor therefore, was affirmed; but Spencer, J. and 10 senators voted for reversing.

(*)CHAPTER III.

OF PAROL AGREEMENTS AND PAROL EVIDENCE.

WITH a view to prevent many fraudulent practices which were commonly endeavored to be upheld by perjury, it was enacted by the 29 Car. II. c. 3, usually called the statute of frauds, that(*a*) “all leases, estates, interests of freeholds, or terms of years, or any uncertain interest of, in, or out of any messuages, manors, lands, tenements or hereditaments, made and created by livery and seisin only, or by parol, and not put in writing by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the effect of leases or estates at will, any consideration for making any such parol leases or estates notwithstanding.” But, nevertheless, leases not exceeding three years, whereupon the reserved rent should amount to two thirds of the full improved value, were excepted(*b*). The Act then requires the assignment, grant, and surrender of existing interests to be made by writing(*c*); and then(*d*) enacts that “no action shall be brought, whereby to charge any person upon any agreement made upon any contract, or sale of lands, tenements, or hereditaments, or any interest

(*a*) Sect. 1.

(*b*) Sect. 2.

(*74)

(*c*) Sect. 3.

(*d*) Sect. 4.

in or concerning them(I)(29), unless the agreement, upon (*)which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

In treating of these legislative provisions, we may consider—1. What interests are within the statute:—2. What is a sufficient agreement:—3. What agreements will be enforced, although by parol;—and 4. In what cases parol evidence is admissible to vary or annul written instruments.

(I) "Or upon any agreement not to be performed within a year;" which clause does not extend to any agreement concerning lands. *Hollis v. Edwards*, 1 Vern. 159. It is quite clear, that an agreement for sale of lands must be in writing, although the contract is to be performed the next day. See *Bracebridge v. Heald*, 1 Barn. and Ald. 722.

(29) MEMORANDUM. In most of the *United States*, provisions by statute, for the prevention of frauds and perjuries, have been found necessary. The *English* Statute of 29 Car. 2. c. 3. has been the guide to legislative enactments on this subject. In some of the states, this act has been adopted, almost *verbatim*; in others, similar provisions, though with some modification, have been enacted. The want of uniformity of legislation, in the different states, has given rise to a corresponding diversity of judicial opinions. For a similar reason, the *American* decisions, on certain points, are not always in unison with those of *Westminster Hall*: But wherever the provisions of the *English* statute have been re-enacted, the construction given them by the English courts, has, generally, been adopted by our own. [*Downey v. Hotchkiss*, 2 Day, 225.] The *American* decisions referred to in this edition of Mr. Sugden's Treatise, either in support, or contradiction of the principles laid down by him, are to be understood as having reference to the legislative acts of the states, respectively, where such decisions were pronounced.

(*75)

SECTION I.

Of the Interests which are within the Statute.

It was observed in the case of *Crosby v. Wadsworth*(e), that collecting the meaning of the first section by aid derived from the language and terms of the second section, and the exception therein contained, the leases, &c. meant to be vacated by the first section, must be understood as *leases* of the *like* kind with those in the second section, but which conveyed a *larger interest* to the party *than for a term of three years*, and such, also, as were made *under a rent reserved thereupon*; and the Court therefore determined that a sale of a standing crop of mowing grass, then growing, was not within the first section of the statute, because neither of the foregoing circumstances were to be found in the agreement, although, as the agreement conferred an exclusive right to the vesture of the land during a limited time, and for given purposes, it was, the Court held, *a contract* or sale of *an interest in*, or at least an interest *concerning lands*.

It was not, however, necessary in the above case, to (*)decide upon the precise construction of the first section, which seems in this respect to be co-extensive with the fourth, and, consequently, every interest which is within the fourth section is equally within the first, unless it come within the saving of the second section. The first and second sections appear to enact, that all interests actually created without writing shall be void, unless in the case of a lease not exceeding three years, at nearly rack-rent, which exception must have been introduced

(e) 6 East, 610.

(*76)

for the convenience of mankind, and under an impression that such an interest would not be a sufficient temptation to induce men to commit perjury. Perhaps, therefore, the first section ought to extend to every possible interest which is not within the exception in the second clause. If an estate, of whatever value, should be conveyed to a purchaser by livery of seisin, without writing, the act would avoid the estate, although the purchaser had paid his money. An actual lease for any given number of years, whether with or without rent, or any interest uncertain in point of duration, must, it should seem, equally fall within the provision of the first section, and cannot be sustained unless it come within the saving in the second section.

This, however, of itself would not have prevented all the evils which the act intended to avoid; for although actual estates could not be created, yet still parol *agreements* might have been entered into respecting the future creation of them. To remedy this mischief, the provision in the fourth section was inserted, which, it is conceived, relates not to contracts or sales of lands, &c. but to any *agreement* made upon any contract or sale of lands, &c.(I),

(I) This appears to be the true meaning of the statute, although this branch of the fourth section has been sometimes read as a distinct clause, in which case the word *agreement* is dropped, and the clause runs thus, "no action to be brought upon any contract or sale of lands," &c. See Anon. 1 Ventr. 361, and 6 East, 611; but this clause seems to be governed by the preceding one in the same section, as to agreements made upon consideration of marriage. The statute says, no action to be brought, "to charge any person upon *any agreement made upon* any consideration of marriage, or upon [any agreement made upon] any contract or sale of lands," &c. The words between crotchets must, it is submitted, be implied. At the same time, there is certainly ground to contend, that the clause would have the same operation if not governed by the words in the preceding clause.

The statute seems to have been strangely misunderstood in the case of *Charlewood v. Duke of Bedford*, 1 Atk. 497, the report of which

(*)and as agreements were more to be dreaded than contracts actually executed, no exception was inserted after (*)the fourth section, similar to that which follows the first section, and consequently an *agreement* by parol, to create even such an interest as is excepted in the second section, would be merely void.

If this be the true construction of the Act it answers the purposes for which it was passed, and the question in all cases must be—Is the interest in dispute actually created by the parties, or does the contract rest *in fieri*? If it be actually created, it is avoided by the first section,

agrees with the Registrar's book. The object of the bill was to compel the performance in specie of a parol *agreement*, by the Duke's steward, to grant a lease. The case, therefore, fell within the fourth section, but the defendant pleaded the first, and to bring his case within it, stated the words of the statute, at the close of that section, to be "any *contract* for making such lease, or any former law to the contrary notwithstanding." The words really are "any *consideration*, &c." The framer of the plea must have adopted an error which has been sometimes entertained, that the first section relates to leases, and the fourth to sales, and this notion compelled him to alter the statute in the way he did, for he could not otherwise have brought his case within it. It is observable that Lord C. B. Comyns, before whom the cause was heard, did not notice the mistake.

Lord Keeper North seems to have entertained the erroneous opinion above noticed; for, in a case which came before him on a parol agreement for a lease, he said that the difficulty that arose upon the act was that it makes void the estate, but does not say the agreement itself shall be void, and therefore, though the estate itself is void, yet, possibly, *the agreement may subsist*, so that a man may recover damages at law for the non-performance of it; and if so, he should not doubt to decree it in equity; and he actually sent the parties to law, in order to have the point decided, and for that purpose directed the defendant to admit the agreement. *Hollis v. Edwards*, 1 Vern. 159. The plaintiff was of course nonsuited in the action, and thereupon Lord North dismissed the bill. His impression before the trial must, it should seem, have been that the first section related to leases, and the fourth only to sales; or at least he must have thought that the fourth did not embrace *agreements* for leases.

unless saved by the second. If it be not actually created, the agreement cannot be enforced by reason of the fourth section, whatever be the nature of it. But if the first section were to be restrained beyond the express provisions of the second section, then, although every parol *agreement* for any interest in lands would be void, yet many estates might still be actually raised by parol. The first section, however, seems to embrace *interests* of *every* description, whilst the exception relates only to *leases* of a *particular* description. One consequence of qualifying all the interests specified in the first section, in the manner proposed by the aid derived from the second section, would be, that an estate in fee might still, as formerly, be conveyed by livery of seisin without writing. But if the doctrine should even be confined to *leases*, yet it would open a considerable door to perjury. If the two requisites are to concur to bring a lease within the first section, namely, a larger interest than that mentioned in the second section, and a reserved rent, then it should seem that a lease by parol for a thousand years without rent would be valid, notwithstanding the statute. If even one only of these requisites be essential, yet cases of importance may be taken out of the Act; an estate, however valuable, may be claimed under a parol lease for any term short of three years without rent. This is the temptation to perjury which the statute intended to remove. And (*)this mischief must necessarily follow, that if the parties swear to an *agreement* for such an interest it will be within the statute; whereas if they swear to an actual demise the case will be taken out of the statute.

The construction suggested in *Crosby v. Wadsworth*, of the first section of the statute, has since been attempted to be extended to the third section. It has been contended that the leases mentioned in the third section, as requiring to be assigned by writing, must be intended such leases as are required by the first and second sections of the

statute to be created by deed or writing, viz. leases conveying a larger interest to the party than for a term of three years; but the Lord C. Baron, at *nisi prius*, ruled otherwise, and appears to have held, that although an interest was created by parol, by virtue of the second section, yet it cannot be assigned without a note in writing, by reason of the third section(*f*). And even a tenancy from year to year created by parol, cannot be surrendered, although by mutual consent, by parol(*g*).

But it has been decided, that a mere license is not within the first section of the statute of frauds. This was decided in the case of *Wood v. Lake*(*h*)(30). A parol

(*f*) See *Botting v. Martin*, 1 Camp. Ca. 13, but *qu.* whether the *agreement* or the *assignment* was by parol.

(*g*) *Mollet v. Brayne*, 2 Camp. Ca. 103. See *Stone v. Whiting*, 2 Stark. 235; *Thomson v. Wilson*, 2 Stark. 379; *Phipps v. Sculthorpe*, 1 Barn. & Ald. 50; *Thomas v. Cook*, 2 Stark. 408; 2 Barn. & Ald. 119.

(*h*) *Say*. 3; and see *Winter v. Brockwell*, 8 East, 308; *Rex v. Inhabitants of Standon*, 2 Mau. & Selw. 461; *Tayler v. Waters*, 2 Marsh, 551; 7 Taunt. 74; *Rex v. Inhabitants of Horndon*, 4 Mau. & Selw. 562.

(30) See *Cook v. Stearns*, 11 Mass. Rep. 533, 536. *Ricker v. Kelley*, 1 Greenl. Rep. 117. *Thompson v. Gregory*, 4 Johns. Rep. 81. *Jackson v. Buell*, 9 Johns. Rep. 298.

In *Cook v. Stearns*, where the defendant claimed the right by license of the former owner of the land to make the dam, bank and canal in question, the possession of the *locus in quo* being admitted to be in the plaintiff: and he claimed the right of entering thereon to repair and remove obstructions; "because those, whose estate the plaintiff now holds, permitted him to enter and make the bank, and dig the canal;" and without describing the mill as ancient, or setting up any prescriptive right to an easement in the close of the plaintiff, he "alleges that he had the *consent, legally obtained*, to erect his works, of the former owner of the close; and because of that consent, the works being out of repair, he entered to make the necessary repairs." The Court considered the plea of the defendant bad; it not shewing such a license as may be

agreement was entered into for liberty to stack coals on part of a close for seven years, and that during this term the person to whom it was granted should have the sole use (*) of that part of the close upon which he was to have the liberty of stacking coals(I). Lee, C. J. and Dennison, held the agreement to be good. They relied upon the case of Webb and Paternoster(i), where they said it is

(i) Palm. 71.

(I) Sayer is but an inaccurate reporter. It is not stated, but the fact is, that an annual payment was reserved in respect of the easement.

pleaded, and indeed the interest claimed being not in the nature of a license, but of an estate, or at least an easement in the land, which cannot be acquired without writing or prescription, or such a possession or use as furnishes presumption of a grant: neither of which was averred in the plea. "A license," said the Chief Justice, "is technically an authority given to do some one act, or a series of acts on the land of another, without passing any estate in the land. Such as a license to hunt in another's land, or to cut down a certain number of trees. These are held to be revocable when executory, unless a definite term is fixed, but irrevocable when executed. See Viner's Abr. tit. License, A. E. D. G. and the authorities therein cited, which have been examined and found to support the positions laid down by the compiler. It is also holden that such licenses to do a particular act, but passing no estate, may be pleaded without deed. But licenses, which in their nature amount to the granting of an estate for ever so short a time, are not good without deed, and are considered as leases, and must always be pleaded as such." Upon the same principles it was held in *Pond v. Pond*, 14 Mass. R. 403, where the defendant being sued in trespass for cutting down and carrying away trees on a particular close, he set up a license from the plaintiff; and it appeared that partition was made in the probate court according to the agreement of the parties; but not so as to constitute a legal partition; held, that such an agreement was a license to enter and occupy; but the suing of legal process to effect partition would amount to a revocation of the license; and any subsequent trespass would be without justification.

In *Jackson v. Buell* the point decided was, that where a grantor reserves in his deed of conveyance the right to erect a dam on the bank of a stream of water specified, it was an interest in the land; and that ejectment would lie for it.

(*80)

laid down, that a grant of a license to stack hay upon land, does not amount to a lease of the land. As the agreement in the present case was only for an easement, and not for an interest in the land, it did not amount to a lease, and consequently it was not within the statute of frauds. Mr. Justice Forster concurred in opinion, that the agreement did not amount to a lease, but he inclined to be of opinion, that the words in the statute, any *uncertain interest in land*, did extend to this agreement; but Lee and Dennison thought those words related only to interests, which were uncertain as to the time of their duration. After time taken to consider, it was holden, that the agreement was good for the seven years.

The case referred to in Palmer does not seem to bear out the judgment in the above case: the decision turned upon another point; but Montague and Haughton both thought that the interest in that case was such as bound the land in the hands of a subsequent lessee. That case arose before the statute of frauds, and it would require a considerable stretch to make it apply to a case since the statute. No one will deny, that these cases are within the mischief against which the Legislature intended to guard. In Wood and Lake, the plaintiff was to have the sole use of the part of the land upon which he should stack his coals. How is this to be distinguished in substance from an actual demise for seven years? It appears to be in the very teeth of the statute, which extends generally to all (*)leases, *estates* or *interests*. The statute expresses an anxious intention to embrace interests of every description. How can it be argued, that a license not countermandable, and which confers the sole use of a place on a man, is not an interest within the statute? Upon what principle is it, that the person entitled to such an easement may maintain trespass? This relaxation of the statute holds out a strong temptation to a man in possession of land, under a parol agreement, to commit

perjury, in order to ensure to himself a more permanent interest in the land than the statute would permit him to claim, were the real transaction disclosed. The case of *Wood v. Lake* has, however, been followed in several recent cases.

It has been decided, that if, after a lease has been granted, the landlord makes improvements on the estate, in consideration of an agreement to pay an additional sum per annum, the sum is not rent, and the agreement is collateral to the lease, and may therefore be recovered upon, although by parol(*j*).

The fourth section of the Act extends as well to interests created *de novo* out of an estate, as to subsisting interests. Therefore an agreement for an assignment of a lease will not be binding, unless made in writing(*k*)(31).

In a case in Lord Raymond(*l*), Treby, Chief Justice, reported to the other Justices, that it was a question before him at a trial at *nisi prius* at Guildhall, whether the sale of timber, growing upon the land, ought to be in writing, by the statute of frauds, or might be by parol? And he was of opinion, and gave the rule accordingly, (*)that it might be by parol, because it was but a bare chattel; and to this opinion Mr. Justice Powell agreed. This decision, however, may be thought to be overruled by

(*j*) *Hoby v. Roebuck*, 2 Marsh. 433.

(*k*) Anon. 1 Ventr. 361; see *Poultney v. Holmes*, 1 Str. 405.

(*l*) Anon. 1 Lord Raym. 182. See *Hob.* 173; 1 Atk. 175.

(31) Where a person writes his signature, and affixes his seal on the back of a lease it is not an assignment of the lease: And although it be agreed between the assignor and assignee, that J. S. should fill up the assignment over the signature and he does so, the case is still within the statute of frauds. *Jackson v. Titus*, 2 Johns. Rep. 430.

But an assignment of a lease, in writing, though not under seal, is effectual. *Holliday v. Marshal*, 7 Johns. Rep. 211.

(*82)

the late case of *Crosby v. Wadsworth*(*m*), where a sale of a standing crop of mowing grass then growing was held to be within the statute(32). }

The distinction between them appears to be, that in this case, the exclusive right to the vesture of the land was conferred during a limited period, whilst, in the former case, a mere right of entry to cut and carry away the trees would have been held to pass. Indeed, it does not appear by whom the trees were to be felled and carried away.

In the very recent case of *Smith v. Surman*(*n*), the agreement was to sell trees standing as timber, at so much a foot. The proprietor had given orders to cut them down, and the purchaser bought them after two of them had been actually felled. It was held that this was not a contract within the fourth section, but a contract for the purchase of the trees when they should be cut down and severed from the freehold.

In *Parker v. Staniland*, the Court expressed its disinclination to extend the case of *Crosby v. Wadsworth*, which one learned Judge referred to the circumstance, that the grass was growing, and therefore the purchaser had an intermediate interest in the land while the crops were growing to maturity, before they were gathered. Therefore a sale of potatoes in the ground, and which had never been severed, at so much a sack, to be taken away *immediately*, was held not to be within the statute; because the contract was confined to the sale of potatoes, (*)and nothing else was in the contemplation of the parties. They were to be taken *immediately*, and it was quite ac-

(*m*) 6 East, 602, *et supra*; *Waddington v. Bristow*, 2 Bos. & Pull. 452; and see 2 Taunt. 41, *per* Mansfield, C. J.

(*n*) 9 Barn. & Cress. 561; S. C. 4 Man. & R. 455.

(32) See *Newcomb v. Ramar*, 2 Johns. Rep. 421. *in nota*.

(*83)

cidental if they derived any further advantage from being in the land. The purchaser had only an accommodation, and no interest in the soil. The land was considered as a mere warehouse for the potatoes(*o*).

In a case decided in the same term in the Common Pleas, where growing turnips were sold, but no particular time was stated for their removal, nor did it appear what the degree of their maturity was, the Court, without advert- ing to these circumstances, held it to be a sale of an interest in land within the statute(*p*). It must be admitted to be very difficult to distinguish the cases(33).

(*o*) *Parker v. Staniland*, 11 East, 365.

(*p*) *Emerson v. Heelis*, 2 Taunt. 38 ; see 5 Barn. & Cress. 833.

(33) It may be proper to notice in this place, that no title will pass to a purchaser of real estate, under a sheriff's sale, without a deed or note in writing. *Simonds v. Catlin*, 2 Caines' Rep. 61. *Jackson v. Catlin*, 2 Johns. Rep. 248.

So, a sale of land by town officers, without deed, is within the statute of frauds. *Jackson v. Bull*, 2 Caines' Cas. in Error, 301. S. C. 1 Johns. Cas. 81. See *Thomas v. Trustees, &c.* 3 Marsh. 299.

So, a contract for the sale of pews in a house for public worship, is within the statute. *Freeport v. Bartol*, 3 Greenl. 340. An agreement by parol to modify a former agreement respecting an interest in lands, is void : As, where A. leased certain lands to B. and it was afterwards agreed, by parol, that B. should not use the pasture land without paying for it, it was held, that this agreement was within the statute of frauds. *Togon v. Mooney*, 9 Johns. Rep. 358. So, an agreement to extend the time for the performance of a contract in writing for the conveyance of land, is within the statute. *Hasbrouck v. Tappen*, 15 Johns. Rep. 206.

Possession is an interest in land, within the statute ; and a contract for the sale and delivery of the possession of land and the improvements thereon, must be in writing. *Howard v. Easton*, 7 Johns. Rep. 205. But a parol agreement to pay for improvements made on land, is not within the provisions of the statute. *Benedict v. Beebe*, 11 Johns. Rep. 145. See *Frear v. Hardenburg*, 5 Johns. Rep. 272.

So, an agreement for the exchange of lands is within the statute, and must be in writing. *Rice v. Pest*, 15 Johns. Rep. 503.

In a still later case(*q*), where potatoes stated to be *then growing* on three acres and a half of land, were sold by parol, at the rate of 25*l.* per acre, to be dug and carried away by the purchaser, but no time was appointed for that purpose, it was decided that the contract was not within the statute. Lord Ellenborough said, that if this had been a contract conferring an exclusive right to the land for a time, for the purpose of making a profit of the growing surface, it would be a contract for sale of an interest in or concerning lands, and would then fall unquestionably within the range of *Crosby v. Wadsworth*. But here is a contract for sale of potatoes at so much per acre; the potatoes are the subject-matter of sale, and whether at the time of sale they were covered with earth in a field or in a box, still it was a sale of a mere chattel; it falls, therefore, within the case of *Parker v. Staniland*, and that disposes of the point on the statute of frauds.

(*)In the later case of *Evans v. Roberts(r)*, a parol agreement to purchase a cover of potatoes, to be turned up by the seller was held not to be within the fourth

(*q*) *Warwick v. Bruce*, 2 Mau. & Selw. 205; and see *Mayfield v. Wadsley*, 3 Barn. & Cress. 357; S. C. 5 Dowl. & R. 224.

(*r*) 5 Barn. & Cress. 829; S. C. 8 Dowl. & R. 611.

An agreement made by the owner of land with certain commissioners, by which they were allowed to use the banks of a river, in removing obstructions, and in deepening and widening the river, and to use, occupy and enjoy the same, for which they were to pay a compensation to the owner, who agreed to allow them to cut a canal through his land, is a contract concerning an interest in land, and must be in writing. *Phillips v. Thompson*, 1 Johns. Ch. Rep. 131.

A relinquishment of an equity of redemption cannot be proved by parol. *Scott v. M'Farland*, 13 Mass. Rep. 309.

An agreement between the purchaser of land, and a third person that he should be admitted as a partner in the purchase, within the statute. *Henderson v. Hudson*, 1 Munf. 510. But see *Bunnell v. Taintors'* Admr. 4 Conn. Rep. 568. See also, *Parker v. Bodley*, 4 Bibb, 102.

section, although the crop was in a growing state at the time of the sale. It was held, that *a sale of the produce of the land, whether it be in a state of maturity or not, provided it be in actual existence at the time of the contract, is not a sale of any interest within the fourth section.* The determination of the Courts to escape from the rule in *Crosby v. Wadsworth*, without overruling that case, renders it somewhat difficult to apply the law to individual cases; but the rule in *Evans v. Roberts* may safely be considered one of general application(34).

If an entire agreement be made for the sale of real and personal estate, and the agreement as to the land be within the statute, and void, it cannot be supported as to the personal property which was sold with it(s)(35).

(s) *Cooke v. Tombs*, 2 Anst. 420; *Lea v. Barber*, *ib.* 425, cited. See *Chater v. Beckett*, 8 Term Rep. 201; and see *Neal v. Viney*, 1 Camp. Ca. 471; *Corder v. Drakeford*, 3 Taunt. 382; *Mayfield v. Wadsley*, 3 Barn. & Cress. 357; S. C. 5 Dowl. & R. 224.

(34) A contract for the sale of things annexed to the freehold, but which may be separated without violence, or injury, and which, by the terms of the contract, are to be separated, is not within the statute of frauds. *Bostwick v. Leach*, 3 Day, 476. Nor is an agreement not to exercise a right regarding the freehold, as the right of using a mill, &c. within the statute. *Ib.* So, also, it seems, that contracts for the sale of gravel, stones, timber trees, and the boards and bricks of a house to be pulled down and carried away, are not within the statute. The statute contemplates a transfer of lands, or some interest in them. *Ib.*

As to agreements between adjoining proprietors of land, relating to boundaries, See *Boyd's Les. v. Graves*, 4 Wheat. 513. *Jackson v. Dyeing*, 2 Caines' Rep. 198. *Stuyvesant v. Tompkins*, 9 Johns. Rep. 61.

An agreement to remove a fence for the purpose of widening a certain road, not within the statute. *Storms v. Snyder*, 10 Johns. Rep. 109.

The statute does not apply to promises raised by implication of law. *Allen v. Pryor*, 3 Marsh. Ken. Rep. 306. See *Bliss v. Thompson*, 4 Mass. Rep. 488. See *Fischli v. Dumaresly*, 3 Marsh. Ken. Rep. 23. *Goodwin v. Gilbert*, 9 Mass. Rep. 510.

(35) See *Crawford v. Morrell*, 8 Johns. Rep. 2d edit.

(*84)

SECTION II.

Of the form and Signature of the Agreement.

WE may now consider, first, what is a sufficient agreement; 2dly, what is a sufficient signature by the party or his agent; and 3dly, who will be deemed an agent lawfully authorized. And,

First then, it is to be observed, that the statute requires the writing to be signed only by the person to be charged; and therefore, if a bill be brought against a (*)person who signed an agreement, he will be bound by it, although the other party did not sign it, as the agreement is signed by the person to be charged(*t*). This point has been established by the concurrent authority of the Lord Keeper North, Lord Keeper Wright, Lord Chancellor Hardwicke, Lord C. B. Smith, and Bathurst and Aston, Justices, when Lords Commissioners, Lord Chancellor Thurlow, Lord Chancellor Eldon, and Sir Wm. Grant. The legislature has expressly said, that the agreement shall be binding *if signed by the party to be charged*;

(*t*) *Hatton v. Gray*, 2 Ch. Ca. 164; *Cotton v. Lee*, 2 Bro. C. C. 564; *Coleman v. Upcot*, 5 Vin. Abr. 527. pl. 17; *Buckhouse v. Crossby*, 2 Eq. Ca. Abr. 32, pl. 44; *Seton v. Slade*, 7 Ves. jun. 265; *Fowle v. Freeman*, MS.; 9 Ves. jun. 355, S. C. See 1 Scho. & Lef. 20; and 11 Ves. jun. 592; *Western v. Russell*, 3 Ves. & Bea. 187; and see *Wain v. Warlters*, 5 East, 10; *Egerton v. Matthews*, 6 East, 307, which do not impeach this doctrine: see particularly 5 East, 16; and *Allen v. Bennet*, 3 Taunt. 169. As to *Wain v. Warlters*, see *Stadt v. Lill*, 9 East, 348; 1 Camp. Ca. 242; *Ex parte Minet*, 14 Ves. jun. 189; *Ex parte Gardom*, 15 Ves. jun. 286; *Bateman v. Philips*, 15 East, 272; *Saunders v. Wakefield*, 4 Barn. & Ald. 595; *Jenkins v. Reynolds*, 3 Brod. & Bing. 14; S. C. 6 Man. 86.

(*85)

and as Lord Hardwicke has observed, the word *party* in the statute is not to be construed *party* as to a deed, but person in general(*u*); but there have been instances in which the want of the signature to the agreement by the party seeking to enforce it, has been deemed a badge of fraud(*v*); but, perhaps, the transaction ought not to be viewed in that light, unless the other party called on the party who had not signed to execute it, in which case a refusal to sign might be held to operate as a repudiation of the contract(*w*)(I)(36).

(*) In a late case, Lord C. J. Mansfield observed, that *in equity* a contract signed by one party would be enforced, *and it was not clear that it was different at law*(*x*). The rule in equity, it is conceived, is founded simply on the words of the statute, which must be equally binding on the courts of law. There is not an objection which can be made to the rule as applicable to an action at law which will not apply with equal force to a suit in equity. In a later case, accordingly, upon the 17th section, the same learned Judge observed, that every one knows it is the

(*u*) See 3 Atk. 503.

(*v*) See O'Rourke v. Percival, 2 Ball & Beatty, 58.

(*w*) See 2 Ball & Beatty, 371; and Martin v. Mitchell, 3 Swanst. 428.

(*x*) Bowen v. Morris, 2 Taunt. 374.

(I) The author's anxiety to place the law upon a safer footing, induced him to bring in a bill to amend the statute of frauds. He had not an opportunity of pressing it through the House of Commons; but as such things are not accessible, and the law will no doubt be altered, it has been thought right to print the bill in the Appendix, No. 11.

(36) See *Bartstow v. Gray*, 3 Greenl. Rep. 409. *Ballard v. Walker*, 3 Johns. Cas. 60. *Roget v. Merritt*, 2 Caines' Rep. 117. *Douglass v. Spears*, 2 Nott & M'Cord, 207. *Cosack v. Descoudres*, 1 M'Cord, 425. *Clason v. Bailey*, 14 Johns. Rep. 484. *Penniman v. Hartshorn*, 13 Mass. Rep. 87.

(*86)

No. 86. Endings

daily practice of the Court of Chancery to establish contracts signed by one person only, and yet a court of equity can no more dispense with the statute of frauds than a court of law can(y). Lord Eldon has observed, that equity has not upon these points gone further than courts of law : what is the construction of the statute, what within the legal intent of it will amount to a signing, being the same questions in equity as at law. Upon that point, equity professing to follow the law, if a new question should arise, his Lordship said, that he would rather send a case to a court of law(z). In a still later case at *nisi prius*, where the purchaser only had signed, Lord Tenterden said that it was the duty of the auctioneer to sign; and he had often had occasion to lament they do not do so. What a court of equity would do in the case he could not possibly say. He declined deciding the point according to his opinion, as the counsel would not undertake to carry the same forward on a bill of exceptions(a).

(*) But although the agreement must be signed, yet it need not be so averred in a bill for a specific performance ; for the writing, unless signed, would not be an agreement, and as the allegation in the bill of course is that there is an agreement in writing, signature must be presumed until the contrary is shown(b)(37).

If a written agreement has been in a part executed, it seems that an agreement subsequently entered into between the parties, and reduced into writing, will bind them both, if signed by one of them(c).

A receipt for the purchase-money may constitute an

(y) *Allen v. Bennett*, 3 Taunt. 176.

(z) 18 Ves. jun. 183.

(a) *Wheeler v. Collier*, 1 Mood. & Mal. 123.

(b) *Rist v. Hobson*, 1 Sim. & Stu. 543.

(c) *Owen v. Davies*, 1 Ves. 82.

(37) See *Cleaves v. Foss*, 4 Greenl. 1.

agreement in writing within the statute(*d*); and it has frequently been decided, that a note or letter will be a sufficient agreement to take a case out of the statute(*e*)(38); but every agreement must be stamped before it can be read(*f*); and, as this ought to be done, the Court will permit the cause to stand over to get the agreement stamped, and will assist either party in obtaining it for that purpose.

Thus, in *Fowle v. Freeman*(*g*), the agreement was sent by the vendor to his attorney, with a letter written at the bottom, directing him to prepare a technical agreement. The vendor afterwards refused to perform the contract, and the attorney would not deliver the agreement to the purchaser for the purpose of getting it stamped, contending that it was a private letter to him; but the Court, (*)on motion, ordered it to be delivered to the purchaser for that purpose.

(*d*) *Coles v. Trecothick*, 9 Ves. jun. 234; *Blagden v. Bradbear*, 12 Ves. jun. 466.

(*e*) *Coleman v. Upcot*, 5 Vin. Abr. 527, pl. 17; *Buckhouse v. Crossby*, 2 Eq. Ca. Abr. 32, pl. 44.

(*f*) *Ford v. Compton*; *Hearne v. James*, 2 Bro. C. C. 32, 309.

(*g*) Rolls, March 8, 1804. MS. 9 Ves. jun. 351, S. C. but not reported as to this point. See *infra*, ch. 4. s. 3; *Clarke v. Terrel*, 1 Smith's Rep. 399; *Coles v. Trecothick*, 9 Ves. jun. 234.

(38) In *South Carolina*, it has been decided that a receipt signed by the vendor, in these words, "Received of A. 20 dollars, being on account of a plantation on the *Cypress*, sold to him this day for 2,200 dollars, payable in different instalments, as per agreement. Charleston, August 1, 1816, was sufficient to take the case out of the statute of frauds. *Cosack v. Descoudres*, 1 M'Cord, 425.

Where an agent had agreed, by parol, to bid for his principal, at a sheriff's sale, for certain real estate, and who took the titles in his own name, the case will be taken out of the statute of frauds, by an account made out and signed by him, charging his principal with the purchase-money; in which case, the agent was decreed to hold the estate in trust. *Denton v. M'Kenzie*, 1 Des. 289.

(*88)

But if the agreement is admitted by the answer, so as to dispense with the necessity of proving it, the office-copy of the bill, or, if the defendant refuse to produce it, the record itself, may be read in support of the plaintiff's case, and need not be stamped, nor can the fact of the agreement not being stamped be taken advantage of(*h*).

If, upon a treaty for sale of an estate, the owner write a letter to the person wishing to buy it, stating, that if he parts with the estate it shall be on such and such terms (specifying them); and such person, upon receipt of the letter, or within a reasonable time after the offer is made(*i*), accept the terms mentioned in it, the owner will be compelled to perform the contract *in specie*(*j*)(39).

So if a man (being in company) make offers of a bargain, and then write them down and sign them; and another person take them up and prefer his bill, that will be a sufficient agreement to take the case out of the statute(*k*).

But if it appear that, on being submitted to any person for acceptance, he had hastily snatched it up, had refused the owner a copy of it; or if, from other circumstances, fraud in procuring it may be inferred, in case of an action, it will be left to the jury to say whether it was intended by the defendant, at first, to be a valid agreement on his part, or as only containing proposals in writing,

(*h*) *Huddleston v. Briscoe*, 11 Ves. jun. 583.

(*i*) See 3 Mer. 454.

(*j*) *Coleman v. Upcot*, 5 Vin. Abr. 527, pl. 87. See *Gaskarth v. Lord Lowther*, 12 Ves. jun. 107.

(*k*) S. C. *per* Lord Chancellor.

(39) An offer of a bargain, by one person to another, imposes no obligation on the former, until it is accepted by the latter, according to the terms of the offer. Any qualification of those terms invalidates the offer, without the assent of him who made it. *Eliason v. Henshaw*, 4 Wheat. 225, 228.

subject to future revision(*l*): and if the aid of equity be sought, these circumstances would have equal weight (*)with the Court. So in every case it must be considered, whether the note or correspondence import a concluded agreement: if it amount merely to treaty, it will not sustain an action or suit(*m*)(40).

The letters will not constitute an agreement unless the answer to the offer is a simple acceptance, without the introduction of any new term(*n*).

And although a given time be named in the offer for the acceptance of it, yet it may be retracted at any time before it is actually accepted(*o*).

And where a letter or other writing do not in itself evidence all the terms of the engagement by which the person signing it consents to be bound, but it requires from the other party not a simple assent to the terms stated, but a special acceptance which is to supply a farther term of the agreement; there it is obvious that such special acceptance must be expressed in writing, for otherwise the whole agreement will not be in writing, within the statute of frauds(*p*).

The note or writing must specify the terms of the agreement, for otherwise all the danger of perjury which the statute intended to guard against would be let in(41).

(*l*) See *Knight v. Crockford*, 1 Esp. Ca. 189.

(*m*) *Huddleston v. Briscoe*, 11 Ves. jun. 583; *Stratford v. Bosworth*, 2 Ves. & Bea. 341; *Ogilvie v. Foljambe*, 3 Mer. 53.

(*n*) *Holland v. Eyre*, 2 Sim. & Stu. 194; *Routledge v. Grant*, 4 Bing. 653; 1 Moore & Payne, 717; *Smith v. Surman*, 9 Barn. & Cress. 561.

(*o*) *Routledge v. Grant*, *ubi sup.*

(*p*) *Boys v. Ayerst*, 6 Madd. 316.

(40) See *Hobby v. Finch*, Kirby, 14.

(41) A writing acknowledging the reception of a sum of money, being the cash part of the consideration of a sale of land to the plaintiff, (*89)

Thus, upon the sale of nine houses which were in mortgage, the vendor wrote a letter to the mortgagee to this effect: "Mr. Leonard, pray deliver my writings to the bearer, I having disposed of them. Am, &c." The vendor afterwards refused to perform the contract, and pleaded the statute of frauds to a bill filed by the purchaser for a specific performance, and the plea was (*)allowed; because it ought to be such an agreement as specified the terms thereof, which this did not, though it was signed by the party; for this mentioned not the sum that was to be paid, nor the number of houses that were to be disposed of; whether all, or some, or how many; nor to whom they were to be disposed of; neither did this letter mention whether they were disposed of by way of sale or assignment of lease(q): but where the

(q) *Seagood v. Meale*, Prec. Cha. 560; *Rose v. Cunynghame*, 11 Ves. jun. 550; *Card v. Jaffray*, 2 Scho. & Lef. 374; *Lord Ormrod v. Anderson*, 2 Ball & Beat. 363; and see *Champion v. Plummer*, 1 New Rep. 252; *Hinde v. Whitehouse*, 7 East, 558; *Cooper v. Smith*, 15 East, 103; *Richards v. Porter*, 6 Barn. & Cress. 437; S. C. 9 Dowl. & R. 497; all four cases on the 17th section.

without saying more, is not such a memorandum as will take the case out of the statute of frauds. *Ellis v. Deadman*, 4 Bibb, 466.

A memorandum of the sale of land, to be effectual, must not only be signed by the party to be charged, but must contain the substantial terms of the contract, expressed with such certainty that they may be understood from the contract itself, or some other writing to which it refers, without resorting to parol evidence. *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. Rep. 273. S. C. on appeal, 14 Johns. Rep. 15. See *Abeel v. Radcliff*, 13 Johns. Rep. 297. *Givens v. Calder*, 2 Des. 188. *Parker v. Bodley*, 4 Bibb, 102. *Colson v. Thompson*, 2 Wheat. 336, 341.

In *Virginia*, it has been decided, that a letter containing a promise to make a deed of a tract of land, "according to contract," is a sufficient memorandum, under the statute of frauds, notwithstanding the terms of the contract are not mentioned; provided the party claiming the conveyance, can prove by the testimony of one witness, the price which was agreed to be paid for the land. *Johnson v. Ronald's Admr.* 4 Munf. 77.

property is described generally as "Mr. Q.'s house," parol evidence has always been admitted to show to what house the treaty related(*r*).

So where(*s*), upon a parol agreement, the vendor sent a letter to the purchaser, informing him that, at the time he contracted for the sale of the estate, the value of the timber was not known to him, and that he (the purchaser) should not have the estate, unless he would give a larger price; Lord Hardwicke held, that the letter could not be sufficient evidence of the agreement, the terms of it not being mentioned in the agreement itself.

So in a recent case, where an auctioneer's receipt for the deposit was attempted to be set up as an agreement, the Master of the Rolls rejected it, because it did not state the price to be paid for the estate; and it could not be collected from the amount of the deposit, as it did not appear what proportion it bore to the price(*t*).

And here we may notice a case where an agreement was (*)executed which referred to certain covenants, which had been read, contained in a described paper, which, in fact, contained the terms of the agreement. It appeared that all the covenants contained in that paper had not been read; and which of them had been read, and which had not, was the difficulty, which could only be solved by parol testimony; and Mr. Justice Buller held clearly, that such evidence was inadmissible(*u*), as it would introduce all the mischiefs, inconvenience, and uncertainty the statute was designed to prevent; and Lord Redesdale has since unqualifiedly approved of this decision(*w*).

(*r*) *Ogilvie v. Foljambe*, 3 Mer. 53.

(*s*) *Clerk v. Wright*, 1 Atk. 12; and see *Clinan v. Cooke*, 1 Sch. & Lef. 22.

(*t*) *Blagden v. Bradbear*, 12 Ves. jun. 466; see *Elmore v. Kingscote*, 5 Barn. & Cress. 583; S. C. 8 Dowl. & R. 343.

(*u*) *Brodie v. St. Paul*, 1 Ves. jun. 326; *Higginson v. Clowes*, 15 Ves. jun. 516; *Lindsay v. Lynch*, 3 Sch. & Lef. 1.

(*w*) 1 Sch. & Lef. 38; and see *O'Herlihy v. Hedges*, *ibid.* 123.

(*91)

Neither will a performance be compelled on a note or letter, if any error or omission, however trifling, appear in the essential terms of the agreement.

Thus in a case(x) (I) before Lord Hardwicke, the bill was brought to have a specific performance of an agreement, from letters which had passed between the parties. It appeared, that a certain number of years purchase was to be given for the land, but it could not be ascertained whether the rents upon a few cow-gates were (*)5s. or 1s. ; and although there was no other doubt, Lord Hardwicke held, that such an agreement could not be carried into execution. He said, that in these cases it ought to be considered, whether at law the party could recover damages ; for if he could not, the Court ought not to carry such agreements into execution.

The late Lord C. J. Mansfield observed, that there had been many cases in Chancery, some of which he thought had been carried too far, where the Court had picked out a contract from letters, in which the parties never certainly contemplated that a complete contract was contained (y).

(x) Lord Middleton v. Wilson, *et e contra*, Chan. 1741, MS. ; S. C. Lofft, 801, cited. See 9 Ves. jun. 252 ; Stokes v. Moore, 1 Cox, 219 ; Popham v. Eyre, Lofft, 786 ; Gordon v. Trevalyan, 1 Price, 64 ; Blore v. Sutton, 3 Mer. 237.

(y) 3 Taunt. 172.

(I) The case is in Reg. Lib. 1741, fo. 260, by the name of Lord Middleton v. Eyre. The estate was sold by an agent to Dr. Wilson, by parol, and the parties appear to have bound themselves by letters, the particulars of which do not appear in the Register's book. The parties beneficially interested afterwards sold the estate for a greater price to Lord Middleton, who filed a bill for a specific performance of the agreement, and Dr. Wilson filed a cross-bill. The cross-bill was dismissed with costs, and in the original cause a specific performance was decreed. The point in the text is not stated in the Registrar's book.

But although a letter do not in itself contain the whole agreement, yet if it *actually refer* to a writing that does, that will be sufficient, although such writing is not signed(43).

Thus in a case where an estate was advertised to be let for three lives, or thirty-one years, and an agreement was entered into for a lease, in which the term for which it was to be granted was omitted ; Lord Redesdale held, *that if the agreement had referred to the advertisement*, parol evidence might have been admitted to show what was the thing (namely the advertisement) so referred to, for then it would be an agreement to grant for so much time as was expressed in the advertisement ; and then the identity of the advertisement might be proved by parol evidence (z)(44). And Sir William Grant, in a late case, expressed his opinion, that a receipt which did not contain the terms of the agreement, might have been enforced as an agreement, had it referred to the conditions of sale, (*)which would have entitled the Court to look at them for the terms(a).

So an agreement not containing the name of the buyer may be made out by connecting it with a letter from the buyer on the subject(b).

(z) See *Clinan v. Cooke*, 1 Scho. & Lef. 22 ; and see *Cass v. Waterhouse*, Prec. Cha. 29 ; *Hinde v. Whitehouse*, 7 East, 558 ; *Feoffees of Heriot's Hospital v. Gibson*, 2 Dow, 301 ; *Powell v. Dillon*, 2 Ball & Beat. 416.

(a) *Blagden v. Bradbear*, 12 Ves. jun. 466 ; and see *Shippey v. Derison*, 5 Esp. Ca. 190 ; *Hinde v. Whitehouse*, 7 East, 558 ; *Kenworthy v. Schofield*, 2 Barn. & Cress. 945 ; S. C. 4 Dowl. & R. 556 ; 1 Turn. & Russ. 352.

(b) *Allen v. Bennet*, 3 Taunt. 169 ; *Western v. Russell*, 3 Ves. & Bea. 187.

(43) A reference in a deed, to a will, not executed pursuant to statute, will have the effect of incorporating it with, and making it a part of the deed. *Igard v. Montgomery*, 1 Nott & M'Cord, 381.

(44) See *Johnson v. Donald's Admr.* 4 Munf. 77.

(*93)

In a case(c) where an agreement for sale was reduced into writing, but not signed, owing to the vendor having failed in an appointment for that purpose; the vendee's agent wrote to urge the signing of the agreement; and the vendor wrote in answer a letter, in which, after stating his having been from home, he said, "his word should always be as good as any security he could give." And this was held by Lord Thurlow to take the case out of the statute, as clearly referring to the written instrument. The ground of this decision was, that the vendor had agreed, by writing, to sign the agreement. If he had said he never would sign it, he could not have been bound; but if he said he never would sign it, but would make it as good as if he did, it would be a promise to perform it; if he said he would never sign it, because he would not hamper himself by an agreement, it would be too perverse to be admitted(d). It appears that Lord Thurlow was diffident of his opinion in this case; and Lord Redesdale has declared, that he had often discussed the case, and he could never bring his mind to agree with Lord Thurlow's decision, because he (Lord Redesdale) thought the true meaning of the agreement (*)was, "I will not bind myself, but you shall rely on my word(e)."

But in these cases there must be a clear reference to the particular paper, so as to prevent the possibility of one paper being substituted for another(f).

And if the agreement is defective, and the letter refers to a different contract from that proved by the opposite

(c) *Tawney v. Crowther*, 3 Bro. C. C. 161, 318; and see *Forster v. Hale*, 3 Ves. jun. 696; *Cooke v. Tombs*, 2 Anstr. 420; *Saunderson v. Jackson*, 2 Bos. & Pull. 238; and 9 Ves. jun. 250.

(d) *Per* Lord Thurlow, 3 Bro. C. C. 320.

(e) See 1 Scho. & Lef. 34; and see *Tanner v. Smart*, 6 Barn. & Cress. 603; S. C. 9 Dowl. & R. 549.

(f) *Boydell v. Drummond*, 11 East, 142.

party, the letter cannot be adduced as evidence of the contract set up. The letter must be taken altogether, and if it falsify the contract proved by the parol testimony, it will not take the case out of the statute(*g*).

As we shall hereafter see, an auctioneer is an agent lawfully authorized for the vendor and purchaser within the statute. Upon the sale of estates by auction, a deposit is almost universally paid, for which the auctioneer gives a receipt, referring to the particulars, or indorsed on them, and amounting, in most cases, to a valid agreement on the part of the vendor within the statute(*h*). And it seems that a bill of sale, or entry by the auctioneer, of the account of the sale, in his books, stating the name of the owner, the person to whom the estate is sold, and the price it fetched, would be deemed a sufficient memorandum of the agreement to satisfy the statute(*i*). This, however, it clearly would not, unless it either contained the conditions of the sale and the particulars of the property, or actually referred to them, so as to enable the Court to look at them(*j*)(45).

(*)A note or letter, written by the vendor to any third person, containing directions to carry the agreement into execution, will, subject to the before-mentioned rules, be

(*g*) *Cooper v. Smith*, 15 East, 103.

(*h*) See *Blagden v. Bradbear*, 12 Ves. jun. 466, *et supra*.

(*i*) See *Emmerson v. Heelis*, 2 Taunt. 33, *et infra*; but see *Mussell v. Cooke*, Prec. Cha. 533; *Charlewood v. Duke of Bedford*, 1 Atk. 497; *Ramsbottom v. Mortley*, 2 Mau. & Selw. 445.

(*j*) *Blagden v. Bradbear*, *ubi sup.* *Hinde v. Whitehouse*, 7 East, 558; *Kenworthy v. Schofield*, 2 Barn. & Cress. 945; S. C. 4 Dowl. & R. 556.

(45) See *Clason v. Bailey*, 14 Johns. Rep. 490. *Davis v. Robertson*, 1 Rep. Con. Ct. 71.

The original memorandum made by the auctioneer must be produced on the trial, if in existence; a copy will not be received as evidence. *Ib.*

(*95)

a sufficient agreement to take a case out of the statute(*k*). This was laid down by Lord Hardwicke, who said, that it had been deemed to be a signing within the statute, and agreeable to the provision of it. And the point was expressly determined, in the year 1719, by the Court of Exchequer(*l*).—Upon an agreement for an assignment of a lease, the owner sent a letter, specifying the agreement, to a scrivener, with directions to draw an assignment pursuant to the agreement; and Chief Baron Bury, Baron Price, and Baron Page, were of opinion, that the letter was a writing within the statute of frauds. And the same doctrine appears to apply to a letter written by a purchaser(*m*).

In *Kennedy v. Lee*(*n*), Lord Eldon observed, that in order to form a contract by letter, he apprehended nothing more was necessary than this, that when one man makes an offer to another to sell for so much, and the other closes with the terms of his offer, there must be a fair understanding on the part of each as to what is to be the purchase-money, and how it is to be paid, and also a reasonable description of the subject of the bargain. It must be understood, however, that the party seeking the specific performance of such an agreement, is bound to find in the correspondence, not merely a treaty, still less a proposal for an agreement, but a treaty with reference to which, mutual consent can be clearly demonstrated, or a proposal met by that sort of acceptance, which makes it (*)no longer the act of one party but of both. It follows, that he is bound to point out to the Court, upon the face of the correspondence, a clear description of the subject-matter relative to which the contract was in fact made and

(*k*) *Welford v. Beazely*, 3 Atk. 503. See *Seagood v. Meale*, Prec. Cha. 560; *Cooke v. Tombs*, 2 Anstr. 420.

(*l*) *Smith v. Watson*, Bunb. 55; S. C. MS.

(*m*) *Rose v. Cunynghame*, 11 Ves. jun. 550.

(*n*) 3 Mer. 441; and see *Ogilvie v. Foljambe*, 3 Mer. 53.

entered into. His Lordship added, that he did not mean (because the cases which had been decided would not bear him out in going so far) that he was to see that both parties really meant the same precise thing, but only that both actually gave their assent to that proposition, which, be it what it may, *de facto* arises out of the terms of the correspondence. The same construction must be put upon a letter, or a series of letters, that would be applied to the case of a formal instrument; the only difference between them being, that a letter or correspondence is generally more loose and inaccurate in respect of terms, and creates a greater difficulty in arriving at a precise conclusion.

In *Cooth v. Jackson*(*o*), Lord Rosslyn put the case of a bond of reference to a surveyor, the price to depend upon his valuation, only to ascertain how much an acre the purchaser was to pay for the land. And his Lordship said, he should conceive that not to be within the statute.

But rent-rolls, particulars of estates, abstracts, &c. delivered by the vendor on the treaty for sale, will not be considered as an agreement, although signed by him, and containing the particulars of the agreement; nor will letters written, or representations made by him, to creditors, concerning the sale, receive that construction.

Thus, in a case(*p*) where *A* agreed by parol with *B* for the purchase of lands; shortly afterwards, a rent-roll was delivered to *A*, which *B* dated and altered in his own hand-writing; and it was intituled, "Land agreed (*)to be sold by *B* to *A*, from, &c. at twenty-one years purchase, for the clear yearly rent." An abstract of the title, also, stating the contract, was delivered by *A*'s agent, and also further particulars and papers at different times. *B* also wrote to several of his creditors, informing them that

(*o*) 6 Ves. jun. 17.

(*p*) *Whaley v. Bagenel*, 6 Bro. P. C. 5.

(*97)

he had agreed with *A.* for the sale of the estate, at twenty-one years purchase; referred tenants to *A.* as owner of the estate; and set up the contract as a bar to an *elegit*. *B.* afterwards refused to perform the agreement; and to a bill filed for a specific performance, pleaded the statute of frauds, and the plea was allowed.

So, in a later case(*q*), upon a bill filed by a vendee, for a specific performance of a parol agreement for sale of lands, it appeared that the vendor gave the purchaser a particular of the property to be sold, with the terms and conditions, all in his own hand-writing, and signed by him; and it was afterwards delivered, by agreement of both parties to an attorney, to prepare the conveyance from, who prepared a draft, and brought it to the parties, and they read over and approved of it, and agreed to execute the same, whenever a fair copy could be written out. The defendant, however, refused to fulfil his part of the agreement, and pleaded the statute of frauds to the bill; and, as the particular was delivered at the outset of the treaty, no agreement being then made, the Court held it could only be delivered as a list or catalogue of the matters for sale, to enable the purchaser to form a proper estimate of their value; that the signing the particular could have no other effect than to give it authenticity, as a true list of the items then offered for sale; and that the subsequent acts could not affect the original nature of the particular, and turn it into an agreement.

(*)Although an agreement be reduced into writing by

(*q*) *Cook v. Tombs*, 2 Anst. 420; and see *Cass v. Waterhouse*, Proc. Cha. 29.

a person present at the making of it, yet if the parties do not sign it, they will not be bound by it(r)(46).

If an agreement contain all the terms, the sending of it, as instructions to a person to prepare a proper agreement, will not be deemed an intention to extend the agreement, but merely to reduce it into technical language.

Thus, in *Fowle v. Freeman(s)*, after some treaty for the purchase of an estate, certain terms were agreed upon and written down by Freeman the vendor, and afterwards written out by him, as an agreement; viz.—“March 12th, 1803. I agree to sell to Mr. Fowle my estate, &c. for the sum of 27,000*l.* upon the following conditions, &c.” [stating them.] Freeman signed this agreement, and read it to Fowle, who approved of it. Freeman then underwrote a letter to his solicitor in town to the following effect:—“Sir, please to prepare a proper agreement for Mr. Fowle and me to sign, and send it to me at this place. You will also deliver to Mr. Everett,” (the gentleman who carried the letter to town,) “an abstract of my title-deeds for his examination. As soon as the title-deeds are approved of, he engages to lend me 5,000*l.* till Michaelmas next.” The letter was signed and dated by him, and was delivered by Mr. Everett to the solicitor in

(r) *Gunter v. Halsey*, Ambl. 586; *Whitchurch v. Bevis*, 2 Bro. C. C. 559; *Ramsbottom v. Tunbridge*, *Ramsbottom v. Mortley*, 2 Mau. & Selw. 434. 445.

(s) Rolls, 8th March, 1801, MS.; 9 Ves. Jun. 351, S. C.

(46) A parol agreement for the sale of land will not be decreed specifically, though the vendor had given instructions, in writing, stating the terms, to an attorney, to draw the deeds; and though the deeds were drawn in pursuance of such instructions, and the vendor took them home and wrote to the vendee, informing her that they were ready, and requested her to attend and settle the business, but died before the parties met. *Givens v. Calder*, 2 Des. 171.

town. Freeman afterwards refused to perform the agreement; and, to a bill filed by Fowle for a specific performance, pleaded the statute of frauds. The Master of the Rolls held, that if the attorney had prepared an agreement, according to the letter, Freeman would have been compelled to execute it, and the attorney could not alter (*)the agreement itself in any one respect. A letter or proposal will do, although the party repents; and many decrees have been founded merely on letters. If this objection were to hold, he said, it might be contended, that if an agreement contained a reference to title-deeds to be formally executed, it would not do; and his Hnor decreed a specific performance.

In these cases it should be observed, that letters may be stated in a bill as constituting the alleged agreement, or as evidence of an alleged parol agreement. In the first case, the defendant may insist that they do not make out a concluded agreement, and no extrinsic evidence can be received; in the latter he may plead the statute of frauds(*l*).

II. We are next to consider what is a sufficient signature by the party or his agent. Before the statute of frauds, an agreement, although reduced into writing and signed, was not considered as a written agreement unless sealed; but it was regarded as a parol agreement, and the writing as evidence of it(*u*).

It has been justly said that the same rule prevails since the statute of frauds(*x*); for the law of England recognizes only two kinds of contracts; viz. specialties

(*l*) *Birce v. Bletchley*, 6 Madd. 17.

(*u*) See 1 Ch. Ca. 85.

(*x*) See *Marq. of Normanby v. Duke of Devonshire*, 2 Freem. 216.

and parol agreements, which last include all writings not under seal, as well as verbal agreements not reduced into writing(y)(47). In the case of *Wheeler v. Newton*(z), the agreement not having been sealed, seems to have been insisted upon, as leaving the case within the statute : and (*)Lord Commissioner Rawlinson said, that agreements in writing, though not sealed, *had some better countenance* since the statute of frauds and perjuries than they had before(I).

This doubt must have arisen from the common-law doctrine before noticed, that an agreement not under seal is simply a parol agreement, and the writing evidence of it ; but there certainly was no foundation for the doubt : the statute makes signing only requisite to the validity of a written agreement, and it is now clearly established, that sealing is not necessary ; and if a man be in the habit of printing or stamping instead of writing his name, he would be considered to have signed by his printed name(a)(48).

(y) *Rann v. Hughes*, 7 Term Rep. 350, n. ; S. C. MS. *in tot. verbis*.

(z) Prec. Ch. 16.

(a) *Saunderson v. Jackson*, 2 Bos. & Pull. 238 ; *Schneider v. Norris*, 2 Mau. & Selw. 286.

(I) In *Dawson v. Ellis*, 1 Jac. & Walk. 524, the Court was of opinion, that if *A.* contract verbally to sell to *B.* and afterwards contract by writing to sell to *C.*, and then convey the estate to *B.*, he (*B.*) is not liable to perform the contract with *C.*, although he had notice of it before the conveyance.

(47) See *Ballard v. Walker*, 3 Johns. Cas. 60.

(48) An assignment of a lease, by a writing not under seal, is valid. *Holliday v. Marshall*, 7 Johns. Rep. 211. But a blank assignment of a lease, is inoperative : Thus, if a person write his name and affix his seal on the back of a lease, and at the same time, it is agreed between him and the person to whom the assignment is to be made, that an assignment shall be written by a third person, over the signature and seal, and this is done, and the deed delivered to the assignee, the assignment

(*100)

The signature required by the statute is to have the effect of giving authenticity to the *whole* instrument ; and where the name is inserted in such a manner as to have that effect, it does not much signify in what part of the instrument it is to be found(b)(49).

Therefore, the signing the name at the beginning of the agreement will take it out of the statute ; as, if a person write the agreement himself, and begin, "*A. B. agrees to sell, &c.*" and this is only in analogy to the case of a testator writing his name at the beginning of his will, which is equivalent to his signing it ; and yet the statute expressly requires a signature(c).

(*)And such a signature will be sufficient, although a place be left for a signature at the bottom of the instrument(d)(I) ; and yet, as Lord Eldon has observed, it is im-

(b) *Vide Stokes v. Moore*, stated *infra* ; *Allen v. Bennet*, 3 Taunt. 169.

(c) *Knight v. Crockford*, 1 Esp. Ca. 189 ; and see 1 Bro. C. C. 410 ; 3 Esp. Ca. 182 ; 9 Ves. jun. 248 ; and *Saunderson v. Jackson*, 2 Bos. & Pull. 238. See *Cooper v. Smith*, 15 East, 103 ; *Morison v. Turnour*, 18 Ves. jun. 175 ; *Proper v. Parker*, 1 Russ. & Ryl. 625.

(d) *Saunderson v. Jackson*, *ubi supra*.

(I) This question frequently arises upon wills of personalty. *Walker v. Walker*, decided by the Court of Delegates, 19th Feb. 1805. Ann Walker made her will, comprising real and personal estate, which she signed and sealed, and then folded up with this indorsement ; "I signed and sealed my will to have it ready to be witnessed the first opportunity I could get proper persons for it." The usual attestation clause was added, but not signed by any witness. At her death the instrument was found in her drawer in the envelop, and it was determined not to be a good will of the personal property, on the ground, that something appearing by the attestation clause to be intended to be

is a nullity. *Jackson v. Titus*, 2 Johns. Rep. 430. See *Ulen v. Kittedge*, 7 Mass. Rep. 233. *Clason v. Bailey*, 14 Johns. Rep. 484. *Nelson v. Dubois*, 13 Johns. Rep. 175.

(49) See *Argenbright v. Campbell*, 3 Hen. & Munf. 144, 198. *Penniman v. Hartshorn*, 18 Mass. Rep. 87.

possible not to see that the insertion of the name at the beginning was not intended to be a signature, and that the paper was meant to be incomplete till it was further signed.

And if the party know the contents of the agreement, a subscription, as a witness, is a sufficient signing(*e*).

So, where a clerk of an agent duly authorized to treat for a principal, signed an agreement thus, "Witness *A. B.* for *C. D.* agent to the seller," it was holden to be out of the statute(*f*). And it is sufficient, it seems, if the initials of the name are set down(*g*).

But a letter without a signature of the name in some way cannot be brought within the statute. Therefore, a letter written by a mother to her son, beginning "My dear Nicholas," and ending "your affectionate mother," (*)with a full direction, containing the son's name and place of residence, is not a good agreement within the statute(*h*)(50).

It seems that the signature of the purchaser by himself or his agent, on the back of the particulars and conditions of sale, with the sum opposite to it, is a sufficient compliance with the directions of the act(*i*).

And, as we have seen, an agreement not signed, may

(*e*) *Welford v. Beazely*, 3 Atk. 503. See 9 Ves. jun. 251.

(*f*) *Coles v. Trecothick*, 9 Ves. jun. 234; 1 Smith's Rep. 233; but see *Blore v. Sutton*, 3 Mer. 237.

(*g*) *Phillimore v. Barry*, 1 Camp. Ca. 513.

(*h*) *Selby v. Selby*, Rolls, 1817, MS.

(*i*) *Vide supra*, and *Hodgson v. Le Bret*, Camp. N. P. 233; *Phillimore v. Barry*, *ib.* 513; *Goom v. Aflalo*, 6 Barn. & Cress. 117; S. C. 9 Dowl. & R. 148; cases on the 17th sect.; *Emmerson v. Heelis*, 2 Taunt. 38.

done, the instrument was not complete as the last will of the testatrix. 1 Mer. 503. See *Beaty v. Beaty*, 1 Addams, 154.

(50) See *Whitwell v. Wyer*, 11 Mass. Rep. 6. *Bailey v. Ogdens*, 3 Johns. Rep. 399.

be supported by a signature to a writing referring to the agreement.

But the mere altering the draft of the conveyance will not take a case out of the statute(*k*); neither will the writing over of the whole draft by the defendant with his own hand be sufficient, as there must be a signature(*l*). To this rule we may, perhaps, refer the case of *Stokes v. Moore*(*m*); where the defendant wrote instructions for a lease to the plaintiff, in these words: viz. "The lease renewed; Mrs. Stokes to pay the King's tax; also to pay Moore 2*l*. a year, half-yearly; Mrs. Stokes to keep the house in good tenantable repair, &c." Stokes, the lessee, filed a bill for a specific performance, and the Court of Exchequer held it not to be a sufficient signing to take the agreement out of the statute; although it was not necessary to decide the point(*51*).

Lord Eldon is reported to have said, that he had some doubt of the doctrine in this case(*n*).

(*) Mr. Baron Eyre appears to have put it on its true grounds. He said, that the signature is to have the effect of giving authenticity to the whole instrument; and if the name is inserted *so as to have that effect*, he did not think it signified much in what part of the instrument it was to be found; it was, perhaps, difficult, except in the case

(*k*) *Hawkins v. Holmes*, 1 P. Wms. 776, which overruled *Lowther v. Carril*, 1 Vern. 221. See *Shippey v. Derrison*, 5 Esp. Ca. 190.

(*l*) *Ithel v. Potter*, 1 P. Wms. 771, cited.

(*m*) *Stokes v. Moore*, 1 Cox, 219; Cox's n. to 1 P. Wms. 771. See 1 Smith's Rep. 244.

(*n*) And see *Emmerson v. Heelis*, 2 Taunt. 38, and observe how the purchaser's name was signed there. See also *Morison v. Turnour*, 18 Ves. jun. 175; *Western v. Russel*, 3 Ves. & Bea. 187; *Ogilvie v. Foljambe*, 3 Mer. 53.

(51) See *Givens v. Calder*, 2 Des. 171. See note to *Weightman v. Caldwell*, 4 Wheat. 89.

of a letter with a postscript, to find an instance where a name inserted in the middle of a writing can well have that effect ; and then the name being generally found in a particular place, by the common usage of mankind, it may very *probably* [qu. properly] have the effect of a legal signature, and extend to the whole ; but he did not understand how a name inserted in the body of an instrument, and *applicable to particular purposes*, could amount to such an authentication as is required by the statute.

III. In considering what signature satisfies the requisition of the statute, we have necessarily adverted to signatures by agents ; and it will now be proper to consider who will be deemed an agent lawfully authorized within the statute of frauds to sign an agreement for the sale or purchase of an estate(52).

In the first and third sections of the statute of frauds, which relate to leases, &c. the writing is required to be signed by the parties making it, or their agent *authorized by writing*. This latter requisite is omitted in the fourth and seventeenth sections of the statute(I). The Legislature (*)seems to have taken this distinction, that where an interest is intended to be actually passed, the agent must be authorized by writing ; but that where a mere agreement is entered into, the agent need not be constituted by writing ; and therefore an agent may be authorized by parol to treat for, or buy an estate, although the contract

(I) In a note to Mr. East's 7th vol. p. 565, it is said, that by the fourth section, to affect lands, the note must be signed by an agent thereunto lawfully authorized *by writing*, &c., which words, "by writing," are omitted in the seventeenth section, touching the sale of goods. This mistake must be attributed to the hurry of the press, for the agent is in neither section required to be authorized by writing.

(52) See *Irvin v. Thompson*, 4 Bibb, 295.

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itself must be in writing(*o*)(53). It is, however, in all cases, highly desirable that the agent should have a written authority. Where he has merely a parol authority, it must frequently be difficult to prove the existence and extent of it(*p*); although it may be observed that his testimony will be received with great caution against his signature as agent. If, however, at the time of signing, he make a declaration that he has no authority, his principal will not be bound(*q*). But of course, although he purchase in his own name, yet the fact of the agency so as to charge the principal may be made out by parol evidence(*r*).

Although an agent is authorized to sell at a particular price, yet it seems that his clerk cannot contract without a special authority or agreement for that purpose(*s*); which, however, need not be in writing.

(*)The principal may revoke the authority of the agent at any time before an agreement is executed according to the statute, although the agent has previously agreed *verbally* to sell the property(*t*); and an intended purchaser

(*o*) *Waller v. Hendon*, 5 Vin. Abr. 524, pl. 45; *Wedderburne v. Carr*, in the Exchequer, T. T. 1775; 3 Wooddes. 423, cited; *Rucker v. Cammeyer*, 1 Esp. Ca. 175; *Coles v. Trecothick*, 9 Ves. jun. 234; 1 Smith's Rep. 233; *Barry v. Lord Barrymore*, 1 Sch. & Lef. Rep. 28, cited; *Clinan v. Cooke*, *ib.* 22; *Emmerson v. Heelis*, 2 Taunt. 38.

(*p*) *Mortlock v. Buller*, 10 Ves. jun. 292. See *Daniel v. Adams*, Ambl. 495; *Charlewood v. the Duke of Bedford*, 1 Atk. 497; and see 5 Vin. Abr. 522, pl. 35; *Wyatt v. Allen*, MS. App. No. 9.

(*q*) *Howard v. Braithwaite*, 1 Ves. & Beam. 202.

(*r*) *Wilson v. Hart*, 1 Moore, 45.

(*s*) *Coles v. Trecothick*, 9 Ves. jun. 234.

(*t*) See *Farmer v. Robinson*, 2 Campb. 339, n.

(53) See *Ewing v. Tees*, 1 Binn. 450. *Talbot v. Bowen*, 1 Marsh. Ken. Rep. 436.

may in like manner revoke his authority to his agent to purchase(*u*).

The statute requires every agreement as to lands, or some memorandum or note thereof, to be in writing, and signed *by the party to be charged*, or some other person *thereunto*, (that is, to the signing thereof)(*x*) by *him* authorized. And that as to goods, some note or memorandum in writing of the bargain shall be made and signed by the *parties* to be charged by such contracts, or their *agents*, thereunto authorized. And yet it has been decided, that the signature of the party to be charged by himself or agent is sufficient, even in a contract for goods(*y*), although the other party has not signed, and consequently is not bound; so that there appears to be no difference between the two clauses of the statute, in regard to the appointment and power of an agent.

It has, however, been repeatedly decided, that an auctioneer is the agent of both parties upon a sale of goods, so as to be enabled to bind them both under the statute(*z*)(54); whilst, on the contrary, it has been decided, and lately seemed to be the prevailing opinion, that the auctioneer is not the agent of the purchaser upon a sale (*)by auction of *estates*, so as to be authorized to bind him by setting down in writing the terms of the contract(*a*);

(*u*) As to sales by auction, see *Blagden v. Bradbear*, 12 Ves. jun. 467; *Mason v. Armitage*, 13 Ves. jun. 25.

(*x*) See 1 Ves. & Beam. 207.

(*y*) *Allen v. Bennet*, 3 Taunt. 169.

(*z*) *Simon v. Motivos*, 3 Burr. 1921; *Bull. Ni. Pri.* 280; 1 Blackst. 599; *Rucker v. Cammeyer*, 1 Esp. Ca. 105; *Hinde v. Whitehouse*, 7 East, 558; and see *Rondeau v. Wyatt*, 2 H. Blackst. 67; and 1 Ca. & Opin. 142, 143; *Phillimore v. Barry*, 1 Camp. Ca. 513; and see the observations in the 2d edit. of this work, p. 57—64.

(*a*) *Stansfield v. Johnson*, 1 Esp. Ca. 101; *Walker v. Constable*, 2

(54) See *Brown v. Gilliland*, 3 Des. 540.

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but in a late case, upon the sale of an interest within the fourth section, the Court of Common Pleas held, that the auctioneer was an agent for the purchaser, even upon a sale of estates(55). Lord C. J. Mansfield, in delivering judgment, asked, By what authority does he write down the purchaser's name? By the authority of the purchaser. These persons bid, and announce their biddings loudly, and particularly enough to be heard by the auctioneer. For what purpose do they do this? That he may write down their names opposite to the lots; therefore he writes the name by the authority of the purchaser, and he is an agent for the purchaser(b). In a later case(c), the Court of Common Pleas adhered to their former decision, and they considered the signature by the auctioneer of the purchaser's name alone, sufficient, although he was only an agent, to bind the principal; and the conditions expressly required that the highest bidder should sign a contract for the purchase. The principal, however, was present, and did not object to the signature by the auctioneer until after it was made. The action in this case was brought for the auction duty. Upon a bill filed by the seller for a specific performance, the Master of the Rolls decreed it, following the decisions in the Common

Esp. Ca. 659; 1 *Bos. & Pull.* 306; *Buckmaster v. Harrop*, 7 *Ves. jun.* 341; 13 *Ves. jun.* 456; *Coles v. Trecothick*, 9 *Ves. jun.* 234; 1 *Smith*, 257. See 13 *Ves. jun.* 473.

(b) *Emmerson v. Heelis*, 2 *Taunt.* 38. See 1 *Cas. and Opin.* 142, 143.

(c) *White v. Proctor*, 4 *Taunt.* 209.

(55) In the case of *M'Comb v. Wright*, it was decided, that an auctioneer is the agent of the purchaser, either of lands or goods, at auction, to sign a contract for him, as the highest bidder; and his writing the name of the purchaser, as the highest bidder, on the memorandum of sale, immediately on receiving the bid, and knocking down the hammer, is a sufficient signing of the contract within the statute of frauds. 4 *Johns. Ch. Rep.* 659.

Pleas, although his own opinion was, that an auctioneer is not the agent of the purchaser(*d*). The rule, therefore, (*) may now be laid down generally, that an auctioneer is an agent lawfully authorized by the purchaser(56). It was always clear, that an auctioneer, appointed by a vendor, was a good agent for *him* within the statute(*e*).

And although a purchaser bid by an agent, yet the auctioneer is still duly authorized to sign the agreement(*f*).

The agent must be a third person : neither of the contracting parties can be the agent of the other(*g*) ; and therefore, although a purchaser is bound by the signature of the auctioneer, yet the auctioneer himself cannot maintain an action upon such a contract, because the agent whose signature is to bind the defendant must not be the other contracting party upon the record(*h*).

This, however, has since been doubted(*i*) ; and it has been held that the auctioneer's clerk can bind the purchaser by an entry made in his presence. The Court considered the clerk as agent for both parties. The auctioneer and his clerk may be considered as the constituted agents of the vendor ; he appoints the former to announce the biddings, and the latter to take down the names of the purchasers, and the prices of the lots. The clerk may be considered not only as the agent of the vendors but also of the purchasers. By their silence, when the hammer

(*d*) *Kemys v. Proctor*, 3 Ves. & Bea. 57 ; 1 Jac. & Walk. 350 ; *Kenworthy v. Schofield*, 2 Barn. & Cress. 945 ; 4 Dowl. & R. 556.

(*e*) *Vide Supra*.

(*f*) *Emmerson v. Heelis*, 2 Taunt. 38 ; *White v. Proctor*, 4 Taunt. 209.

(*g*) See *Wright v. Dannah*, 2 Camp. 283.

(*h*) *Farebrother v. Simmons*, 5 Barn. & Ald. 333.

(*i*) *Bird v. Boulter*, 1 Nev. & Mann. 313.

(56) See *Davis v. Robertson*, 1 Rep. Con. Ct. 71. *M'Comb v. Wright*, 4 Johns. Ch. Rep. 659. *Cleaves v. Foss*, 4 Greenl. 1.

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falls, he has their authority to execute the contract on their behalf. It was not necessary to overrule *Farebrother v. Simmons*; but the opinion of the Court was in favor of the auctioneer's power to sign as agent of the contracting party. It is certainly irregular that the contracting parties should act as each other's agents, but it (*) is very different where the contract is signed by an individual who is not either of the contractors. Were it to be held otherwise, no broker could maintain an action in his own name for the breach of a contract signed by him; and at any auction, if the auctioneer or his clerk were not allowed to be the agent of the contracting parties at every bidding, each purchaser would have to come to the table and sign his own name.

Finally, a contract by one as agent for another is valid under the statute, although the alleged agent had no authority at the time, provided that the alleged principal afterwards ratifies the contract(j).

SECTION III.

Of Parol agreements not within the Statute.

I. WE have seen what is considered a sufficient agreement to take a case out of the statute; but there are cases in which the performance of an agreement will be compelled, although the terms of it are not reduced to writing: for though the statute provided that no agreement should be good, unless signed by the party to be bound thereby, or some person authorized by him, yet on all the questions upon that statute, the purport of making it has been considered, viz. to prevent frauds and per-

(j) *Maclean v. Dunn*, 4 Bingh. 722; 1 Moo. & P. 761.

juries; and where there has appeared to be no danger of either, the courts have endeavored to take the case out of the statute(*k*).

Upon this ground it was that in the case of *Simon v. Motivos*, Lord Mansfield and Mr. Justice Wilmot (*) expressed a clear opinion, in which Mr. Justice Yates was inclined to concur, that sales by auction were not within the statute, because the solemnity of that kind of sale precludes all perjury as to the fact itself of sale. The case, however, which arose upon the sale of goods, was determined upon the ground of the constructive agency of the auctioneer(*l*), who had set down in writing the name of the purchaser, &c.(*m*).

Succeeding Judges have entertained a different opinion on the great question, whether sales by auction are within the statute of frauds; and it has accordingly been since frequently decided, that sales by auction of estates are within the statute(*n*)(57). And although the point has never been decided, yet, from the present temper of the

(*k*) See 1 Ves. 221.

(*l*) *Vide supra*.

(*m*) 3 Burr. 1921; Bull. Ni. Pri. 286; 1 Blackst. 599.

(*n*) *Stansfield v. Johnson*, 1 Esp. Ca. 101; *Walker v. Constable*, 2 Esp. Ca. 659; 1 Bos. & Pull. 306; *Buckmaster v. Harrop*, 7 Ves. jun. 341, affirmed on appeal, Dec. 1806; *Blagden v. Bradbear*, 12 Ves. jun. 466; and see *Coles v. Trecothick*, 9 Ves. jun. 249; *Hinde v. Whitehouse*, 7 East, 558; *Mason v. Armitage*, 13 Ves. jun. 25; *Higgenson v. Clowes*, 15 Ves. jun. 516. The case of *Symonds v. Ball*, 8 Term Rep. 151, turned on the particular provisions of another act of parliament.

(57) Particulars of sale of lands, advertised to be sold at auction, signed by the vendors, held to be a sufficient memorandum in writing, within the statute. *Hobby v. Finch*, Kirby, 14. *Ellsworth*, J. dissenting.

In the state of *New-York*, it has been decided, that sales of estates, at auction, by the sheriff, are within the statute, and to pass the estate, require a note or memorandum in writing. *Jackson v. Catlin*, 2 Johns. Rep. 248. S. C. affirmed on error, 8 Johns. Rep. 406. 2d edit. *Simonds v. Catlin*, 2 Caines' Rep. 61, 64.

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courts, it seems probable that it will be determined, that sales by auction, even of goods, are within the statute(o).

But on the ground that there is no danger in such a transaction of either fraud or perjury, a sale before a Master, under the decree of a court of equity, will be carried into execution, although the purchaser did not subscribe any agreement. The judgment of the Court, in confirming the purchase, takes it out of the statute(p)(58).

So if, under a reference to a Master, an agreement be made to lay out trust-money in the purchase of particular lands, and the Master make his report accordingly, and (*)the report be confirmed without any opposition by the owner of the estate, the purchase will be carried into a specific execution, although no agreement was signed by the vendor. The sale is a judicial sale, which takes it entirely out of the statute(q)(59).

II. It has been repeatedly determined in equity(r), that if a bill be brought for the execution of an agreement not in writing, nor so stated in the bill, yet if the defendant put in his answer, and confess the agreement, that takes the case entirely out of the mischief intended

(o) So decided in *Kenworthy v. Schofield*, 2 Barn. & Cress. 945; 4 Dowl. & R. 556.

(p) *Attorney General v. Day*, 1 Ves. 218; and see 12 Ves. jun. 472.

(q) S. C.

(r) *Croyston v. Banes*, Prec. Cha. 208; and see 1 Ves. 221, 441; Ambl. 586; Mose. 370; and *Symondson v. Tweed*, Prec. Cha. 437; Gilb. Eq. Rep. 35; *Wanby v. Sawbridge*, 1 Bro. C. C. 414, cited.

(58) In *Boykin's Dev. v. Smith*, 3 Munf. 102, it was held, that a release entered by verbal direction, in open Court, was valid, and satisfied the statute.

(59) In relation to this subject, see the reasoning of KENT, J. in *Simonds v. Catlin*, 2 Caines' Rep. 64.

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to be prevented by the statute(60); and there being no danger of perjury, the Court would decree it; and if the defendant should die, upon a bill of revivor against his heir, the same decree would be made as if the ancestor were living, the principle going throughout, and equally binding the representatives(s).

Lord Chancellor Bathurst, however, held that an agreement, not in part performed, could not be carried into execution, although confessed by the answer. In *Eyre v. Popham*(t), addressing himself to Mr. Ambler, he asked if there was any case in which there had been a decree founded upon a confession generally without a part performed? and Mr. Ambler replied, that in some of the cases, the Chancellor had been mentioned to have said it, but he never found a decree. In giving judgment, his Lordship is reported to have said, "This is not an agreement in writing, upon the statute of frauds; but the question is, whether it is an agreement which so appears as that the Court will decree a performance. It has been (*)said, that it is a known rule in this Court, that where an agreement appears confessed, the Court will decree a performance, though no part has been performed: some *dictums* there have been, but Mr. Ambler confesses that he has found no decree—that where the substance clearly appears, though in parol, without any part performed, the Court will decree an agreement to be executed. I think it cannot be possible; this Court cannot repeal the statute of frauds, or any statute. The King has no such power, by the constitution, intrusted to him; and therefore there

(s) *Per* Lord Hardwicke, see 1 Ves. 221.

(t) Lofft, 808, 809; and see *Eyre v. Iveson*, 2 Bro. C. C. 563, cited.

(60) See *Smith v. Brailsford*, 1 Des. 350. *Kerr v. Love*, 1 Wash. 172. *Fowler v. Lewis*, 3 Marsh. Ken. Rep. 445. See *contra*, *Thompson v. Tod*, 1 Peters' Rep. 388.

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can be no such power in his delegates. The only case I know that takes a contract out of the statute is of fraud, and the jurisdiction of this Court is principally intended to prevent fraud and deceit. Where a party has given ground to another to think he had a title secured, the Court will secure it to him. The ground, therefore, in making and refusing decrees, has been fraud. It can never be laid down by the Court, that where the substance appears it shall be executed. It would not have been so at common law."

In the discussion of the foregoing case, neither the bar nor the court appear to have been aware of a case before Lord Chancellor Macclesfield(*u*), in which the defendant having pleaded the statute of frauds to a bill seeking a specific performance of a parol agreement, his Lordship said, the plea was proper, but then the defendant ought, by answer, to deny the agreement; for if he confessed the agreement, the Court would decree a performance, *notwithstanding the statute*; for that such confession would not be looked upon as perjury, or intended to be prevented by the statute. And he therefore confirmed an order, that the plea should stand for an answer, with (*)liberty for the plaintiff to except thereto, and that the benefit thereof should be saved to the defendant until the hearing of a cause. And Lord Hardwicke appears to have entertained the same opinion(*x*)(61).

In *Whitchurch v. Bevis*(*y*), Lord Thurlow at first

(*u*) *Child v. Godolphin*, 1 Dick. 39; 2 Bro. C. C. 566, cited; and See *Hartley v. Wilkinson*, Irish Term Rep. 357.

(*x*) See *Cottington v. Fletcher*, 2 Atk. 155; and see 3 Atk. 3; but see 4 Ves. jun. 24.

(*y*) 2 Bro. C. C. 559; 2 Dick. 664.

(61) *Smith v. Brailsford*, 1 Des. 350. In this case the defendant admitted by his answer, that he had taken possession of, and held the land under the agreement.

expressed his opinion, that the only effect of the statute was, that an agreement should not be proved *aliunde*. No evidence that could be given would sustain the suit if the defendant answered and denied the agreement. In this case the agreement was confessed, but the statute was pleaded, and it was ultimately decided on its own particular circumstances. Lord Thurlow said, he meant to determine upon the ground of this particular case; because it might become to be more seriously considered what sort of a verbal agreement, notwithstanding the plea of the statute of frauds, might be sustained, as being confessed by the answer, so as the Court would carry it into execution. His Lordship added, that he was prepared to say, if there were general instructions for an agreement, consisting of material circumstances to be hereafter extended more at large, and to be put into the form of an instrument, with a view to be signed by the parties, and no fraud, but the party takes advantage of the *locus pœnitentiæ*, he should not be compelled to perform such an agreement as that, *when he insists upon the statute of frauds*.

It is curious to observe the different opinions which have prevailed on this point. Lord Macclesfield held, that if the agreement was confessed, even a plea of the statute would not protect the defendant; in which opinion he seems to have been followed by Lord Hardwicke. On the other hand, Lord Bathurst thought that, unless there (*)were fraud, an admission of the agreement by the defendant would not enable the Court to decree it, although the defendant did not insist on the statute. Lord Thurlow appears to have been of opinion, that if the agreement was admitted, the statute could only be used as a defence where there was a clear *locus pœnitentiæ*, but that evidence could not be admitted to falsify the defendant's answer.

None of the foregoing opinions has, however, been attended to. Mr. Baron Eyre seems to have led the way

in holding, that if the defendant, by his answer, insisted upon the statute of frauds, a specific performance could not be decreed, although he confessed the agreement(z). And Lord Thurlow, notwithstanding his opinion in *Whitchurch v. Bevis*, said, in the prior case of *Whitbread v. Brockhurst*, that it should rather seem that if the defendant confesses the agreement in his answer, but insists upon the statute, it would be more simple and conformable to reason to say, that the statute should be a bar to the plaintiff's claim(a); and these opinions have been adopted by Lord Rosslyn and Lord Eldon(b); and Sir William Grant actually decided, that the statute may be used as a bar to the relief, although the agreement be admitted(c). It is immaterial, he said, what admissions are made by a defendant insisting upon the benefit of the statute, for he throws it upon the plaintiff to show a complete written agreement; and it can no more be thrown upon the defendant to supply defects in the agreement, than to supply the want of an agreement(62).

(z) *Stewart v. Careless*, 2 Bro. C. C. 564, 565, cited; *Walters v. Morgan*, 2 Cox, 369.

(a) See 1 Bro. C. C. 416.

(b) *Moore v. Edwards*, 4 Ves. jun. 23; *Cooth v. Jackson*, 6 Ves. jun. 12; *Row v. Teed*, 15 Ves. jun. 375; see *Rondeau v. Wyatt*, 2 H. Blackst. 63; and 1 Rose, 300.

(c) *Blagden v. Bradbear*, 12 Ves. jun. 464; see also 2 Ball & Beat. 349.

(62) Judicial opinions, as to the effect or necessity of an answer, on a bill for the specific performance of a parol agreement for the sale of lands, admitting or denying the agreement, have been almost as diversified in the *United States*, as in *England*. In *Virginia*, it has been determined, that if the defendant by his answer admit, that certain goods were to be charged to him, upon *certain conditions*, there being no other evidence in the case, such admission ought to be the rule by which the charge should be regulated. *Kerr v. Love*, 1 Wash. 172. In *Pennsylvania*, it seems to be the settled rule, that although the defendant answer, and admit the agreement as stated in the bill, he may, neverthe-

Where, however, a defendant has, by answer, admitted (*)the agreement, and submitted to perform it, he cannot, by an answer to an amended bill, plead the statute of frauds(*d*).

If the defendant deny the agreement, he may be tried for perjury; but a conviction will not enable equity to decree a performance of the agreement(*e*)(I); and therefore, as the plaintiff cannot avail himself in any civil proceedings of the conviction of the defendant, he is a competent witness to prove the perjury(*f*).

III. There are other cases taken out of the statute, not so much on the principle of no danger of perjury, as that the statute was not intended to create or protect fraud. Lord Keeper North appears to have entertained a floating

(*d*) *Spurrier v. Fitzgerald*, 6 Ves. jun. 548.

(*e*) *Bartlett v. Pickersgill*, 4 Burr. 2255; 4 East, 577, n. (*b*); 1 Cox, 15. See *Rastel v. Hutchinson*, 1 Dick. 44, and *Fell v. Chamberlain*, 2 Dick. 484; *Burdon v. Browning*, 2 Taunt. 520.

(*f*) *The King v. Boston*, 4 East, 572.

(I) It appears that the plaintiff in *Fell v. Chamberlain* did prefer a bill of indictment for perjury against the defendant; and the Master of the Rolls granted an order to the six clerks to deliver the bill and answer, interrogatories, and depositions of witnesses to a solicitor, in order to be produced at the trial. Reg. Lib. A. 1772, fo. 496.

less, protect himself against the performance of it, by pleading the statute. *Thompson v. Tod*, 1 Peters' Rep. 388. In *South Carolina*, the contrary rule has been adopted. *Smith v. Brailsford*, 1 Des. 350. On a bill for a specific performance of a parol agreement for the sale of lands, in a case not tainted with fraud, if the defendant chooses to avail himself of the statute, he need not, by his answer, admit or deny the agreement, the law having declared it void. *Givens v. Calder*, 2 Des. 171, 190. See *Argenbright v. Campbell*, 3 Hen. & Munf. 144, 153, 160, 161. *Grant v. Craigmiles*, 1 Bibb, 203. And in *Kentucky*, it has been held, that although the defendant omit to plead the statute of frauds, a specific performance will not be decreed, unless he confess the agreement, *Fowler v. Lewis*, 3 Marsh. Ken. Rep. 445.

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opinion, although he never actually decided the point, that if the plaintiff laid in his bill that it was part of the agreement that the agreement should be put into writing, it would take the case out of the statute(*g*). In a case before Lord Thurlow(*h*), this doctrine was stated at the bar ; and in answer to it, his Lordship said, he took that to be a single case, and to have been overruled. *If you interpose the medium of fraud, by which the agreement is prevented from being put into writing I agree to it, otherwise* (*) I take Lord North's doctrine, 'that if it had been laid in the bill, that it was a part of the agreement that it should be put into writing, it would have done,' to be a single decision, and contradicted, though not expressly, yet by the current of opinions."(63)

So where agreements have been carried partly into execution, the Court will decree the performance of them, in order that one side may not take advantage of the statute, to be guilty of fraud(*i*)(I)(64).

(*g*) *Hollis v. Whiting, or Edwards*, 1 Vern. 151, 159 ; *Leake v. Morrice*, 2 Cha. Ca. 135.

(*h*) *Whitchurch v. Bevis*, 2 Bro. C. C. 565.

(*i*) See 1 Ves. 221 ; *Taylor v. Beech*, 1 Ves. 297.

(I) The ground of relief in these cases is fraud, and that species of fraud which is conusable in equity only ; although it seems that the Court of King's Bench once held, that where an agreement was partly executed, *it was totally out of the statute*. See 1 Bro. C. C. 417.

(63) See *Dandridge v. Harris*, 1 Wash. 326.

(64) See *Niven v. Belknap*, 2 Johns. Rep. 573, 587. *Smith v. Patton's Les.* 1 Serg. & Rawle, 80. *Wetmore v. White*, 2 Caines' Cas. in Error, 87. *Billington v. Welsh*, 5 Binn. 129, 131. The contract, as laid in the bill, must be made out by clear and satisfactory proof ; and the act of part performance must refer to the identical contract set up ; it must be unequivocal ; a reference to *some* agreement is not sufficient. *Phillips v. Thompson*, 1 Johns. Ch. Rep. 131. *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. Rep. 273. In certain cases, where, by the rules of law, a court of equity is not warranted in decreeing the ex-

An agreement will not be considered as partly executed, unless the acts done are such as could be done with no other view or design than to perform the agreement; or perhaps, to speak more correctly, with the view of the agreement being performed; and if it do not appear but the acts done might have been done with other views, the agreement will not be taken out of the statute(k).

Neither will acts merely introductory, or ancillary to

(k) *Gunter v. Halsey*, Ambl. 586; *Lacon v. Mertins*, 3 Atk. 1; and see 19 Ves. jun. 479.

ecution, of a contract in specie, a compensation will be awarded to the party injured by the non-performance of the agreement. As where, by mistake, the defendant was unable to perform his contract, which was for the sale of land. *M'Ferran v. Taylor*, 3 Cranch, 270, 281. See *Hepburn v. Auld*, 5 Cranch, 262. *Pratt v. Law*, 9 Cranch, 456. So also, where a party has sustained an injury by the non-performance of a contract within the statute of frauds, for which he ought to be compensated, and for which he has no remedy, or, at best, a doubtful and inadequate one, at law, an issue of *quantum damnificatus* will be awarded. *Phillips v. Thompson*, 1 Johns. Ch. Rep. 131. So, a reasonable compensation will be afforded to a party, who has entered into possession of lands, and made beneficial and lasting improvements, under an imperfect agreement, either to purchase, or take a lease of them. *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. Rep. 273. But see S. C. on appeal, 14 Johns. Rep. 15. *contra*; the Court of Errors decreed a specific performance of the agreement. See *Sherburn v. Fuller*, 5 Mass. Rep. 133, 138. as to the recovery of money when the contract is rescinded. Under the act of *Pennsylvania*, "for the prevention of frauds and perjuries," a parol agreement for the sale of lands, is not void; but the act restricts the operation of the agreement, so far, that no title can be derived by virtue of it; yet an action will lie to recover damages for the non-performance of such an agreement: *Bell v. Andrews*, 4 Dall. 152. See *Ewing v. Tees*, 1 Binn. 450.

Where a contract relating to an interest in lands, has been executed by one party, it may be proved by parol evidence; and a court of equity will either decree a specific performance, or a return of the money expended, as the equity of the case may require. *Cady v. Cadwell*, 5 Day, 16.

(*116)-

an agreement; be considered as a part-performance, although attended with expense. Therefore, delivering an abstract, giving directions for conveyances, going to view the estate, fixing upon an appraiser to value stock, making valuations, &c.(*l*), will not take a parol agreement out of the statute(65).

(*)But if possession be delivered by the purchaser, the agreement will be considered as in part executed(*m*)(66);

(*l*) Clerk v. Wright, 1 Atk. 12; Whitbread v. Brockhurst, 1 Bro. C. C. 412; Cole v. White, 1 Bro. C. C. 409, cited; Whitchurch v. Bevis, 2 Bro. C. C. 559; Whaley v. Bagenal, 6 Bro. P. C. 645; Cooke v. Tombs, 2 Anst. 420; and see Cooth v. Jackson, 6 Ves. jun. 12; and Redding v. Wilkes, 3 Bro. C. C. 400.

(*m*) Butcher v. Stapely, 1 Vern. 363; Pyke v. Williams, 2 Vern. 465; Lockey v. Lockey, Prec. Cha. 518; Earl of Aylesford's case, 2 Stra. 783; Binstead v. Coleman, Bunb. 65; S. C. MS. in *tot verbis*; Barrett v. Gomeserra, Bunb. 94; Lacon v. Mertins, 3 Atk. 1; Wills v. Stradling, 3 Ves. jun. 378; Bowers v. Cator, 4 Ves. jun. 91; Denton v. Stewart, 4th July 1786, cited in Mr. Fonbl. note to 1 Trea. Eq. 175 (1); Gregory v. Mighell, 18 Ves. jun. 328; Kine v. Balfe, 2 Ball & Beat. 343; Morphet v. Jones, Rolls, Feb. 1818, MS.; 1 Swanst. 172.

(I) In this case the plaintiff not only purchased the house, but also the furniture, for which she had actually paid; and it appears by the decree, that there was a receipt given by the defendant, the contents of which, however, are not stated in the Registrar's book. The defendant positively denied the agreement, and insisted that the plaintiff was only tenant at will. Reg. Lib. A. 1785, fo. 552, by the name of Denton v. Seward; *ibid.* 717, by the name of Denton v. Stewart.

(65) See Jones v. Peterman, 3 Serg. & Rawle, 546. Niven v. Belknap, ut supra. Davenport v. Mason, 15 Mass. Rep. 85. Bassler v. Niesly, 2 Serg. & Rawle, 355. Phillips v. Thompson, 1 Johns. Ch. Rep. 131. Parkhurst v. Cortlandt, 1 Johns. Ch. Rep. 273. Givens v. Calder, 2 Des. 171.

(66) See Wetmore v. White, 2 Caines' Cas. in Error, 87. [Contra, at law, per KENT, Ch. J. Jackson v. Pierce, 2 Johns. Rep. 221. See Davenport v. Mason, 15 Mass. Rep. 92.] Syler's Les. v. Eckhart, 1 Binn. 378. Billington's Les. v. Welsh, 5 Binn. 129, 131. Smith v. Patton's Les. 1 Serg. & Rawle, 80. Bassler v. Niesly, 2 Serg. & Rawle, (*116)

especially if he expend money in building or improving according to the agreement(*n*)(67), for the statute should never be so turned, construed, or used, as to protect or be a mean of fraud(*o*).

Possession, however, must be delivered in part-performance; for if the purchaser obtain it wrongfully, it will not avail him(*p*)(68). And a possession which can be referred to a title distinct from the agreement will not take a case out of the statute. Therefore, possession by a tenant cannot be deemed a part-performance. The delivery of possession, by a person having possession, to the person claiming under the agreement, is a strong and marked circumstance; but a tenant of course continues in possession, unless he has notice to quit; and (*)the mere fact of his continuance in possession (which is all that can be admitted, for *quo animo* he continued in possession, is not a subject of admission) cannot weigh with the Court(*q*)(69).

(*n*) *Foxcraft v. Lister*, 2 Vern. 456; Gilb. Eq. Rep. 4, cited; Colles P. C. 108, reported; *Floyd v. Buckland*, 2 Freem. 268; *Mortimer v. Orchard*, 2 Ves. jun. 243; *Toole v. Medlicott*, 1 Ball & Beatty, 393. See *Wheeler v. D'Esterre*, 2 Dow, 359; and see 19 Ves. jun. 479.

(*o*) See 3 Burr. 1919.

(*p*) *Cole v. White*, 1 Bro. C. C. 409, cited.

(*q*) *Wills v. Stradling*, 3 Ves. jun. 378; *Smith v. Turner*, Prec. Cha. 561. cited; *Savage v. Carrol*, 1 Ball & Beatty, 265.

355. *Jones v. Peterman*, 3 Serg. & Rawle, 546. *Fox v. Longly*, 1 Marsh. Ken. Rep. 388. *Downey v. Hotchkiss*, 2 Day, 225. *Ebert v. Wood*, 1 Binn. 216. *Smith v. Brailsford*, 1 Des. 350. *Niven v. Belknap*, 2 Johns. Rep. 573. 587. *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. Rep. 273. S. C. on appeal, 14 Johns. Rep. 15.

(67) See the following cases, inserted in the preceding note. *Wetmore v. White*; *Syler's Les. v. Eckhart*; *Smith v. Patton's Les.*; *Jones v. Peterman*; *Downey v. Hotchkiss*; *Fox v. Longly*; *Niven v. Belknap*; *Parhhurst v. Van Cortlandt*.

(68) See *Givens v. Calder*, 2 Des. 171.

(69) See *Parkhurst v. Van Cortlandt*, 14 Johns. Rep. 15. on appeal.

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But if he pay an additional rent, although that is *per se* an equivocal circumstance (for it may be that he shall hold only from year to year, the lease being expired), yet there may be other inducements. If, therefore, it be averred that the landlord accepted the additional rent upon the foot of the agreement, the acceptance upon the ground of the agreement will not be equivocal at all. The landlord, in such a case, must answer whether it was accepted upon a holding from year to year, or any other ground(*r*).

If it be part of such a contract with a tenant in possession, that money shall be laid out, and it is one of the considerations for granting the lease (the laying out which must be then with the privity of the landlord), it is very strong to take it out of the statute(*s*). But it is necessary that the act should unequivocally refer to and result from the agreement, and such that the party would suffer an injury amounting to fraud, by the refusal to execute that agreement. Therefore, where upon the faith of a promise of a renewal, a tenant rebuilt a party-wall, the agreement was held to be within the statute. The act done was equivocal: for it would have taken place equally if there had been no agreement: it was such also as easily admitted of compensation, without executing the agreement. The money expended might be recovered from the landlord, if it was by the landlord that the expense was to be borne(*t*)(70).

(*)In a late case, Lord Redesdale thought that it was absolutely necessary for courts of equity in these cases, to

(*r*) *Wills v. Stradling, ubi sup.*

(*s*) S. C.

(*t*) *Frame v. Dawson*, 14 Ves. jun. 386. See *Lindsay v. Lynch*, 2 Scho. & Lef. 1; *O'Reilly v. Thompson*, 2 Cox, 271.

(70) See *Philips v. Thompson*, 1 Johns. Ch. Rep. 149, 150.

make a stand, and not carry the decisions farther(u)(71).

It is generally understood, that payment of a substantial part of the purchase-money will take a parol agreement out of the statute. How far this opinion is well founded, appears to be deserving of particular consideration(72).

There are four cases in Tothill, which arose previously

(u) See 2 Scho. & Lef. 5.

(71) Accordant, *Philips v. Thompson*, ut supra. per KENT. *Grant v. Naylor*, 4 Cranch, 234. *King v. Riddle*, 7 Cranch, 171. and *Clementson v. Williams*, 8 Cranch, 74. per MARSHALL, Ch. J.

In the later case of *Kidder v. Hunt*, 1 Pick. 328, which was assumpt on the contract itself, setting forth the verbal agreement, which was for the lease of certain premises for five years, yielding and paying rent therefor, making repairs, &c.; whereupon the plaintiff entered into possession and expended money. Upon demurrer to the plea of the statute of frauds pleaded by the defendant, the court held the plea good. The ground of this decision was, that the contract related to an interest in land and not being in writing, no action according to the statute could be maintained on such a contract. But "certainly so much as has been expended by the plaintiff in money, or labor, may be recovered in an action for money paid, or for work done for the defendant. There are no doubt, cases proper for a court of chancery, such as those which relate to the execution of trusts, where the common law will give a remedy by an action of damages; and perhaps in a parol contract respecting land; where the party has been put to expense, as to his part of the contract, under circumstances which would amount to fraud by the other party, case might lie for damages for the fraud as was intimated in *Boyd v. Stone*, 11 Mass. 342; but this action is brought upon the contract itself, and to sustain it would be indirectly to give efficacy to a contract which the legislature says shall have none. It is on the ground of fraud only that the court of chancery undertakes to decree performance of such a contract." Vide *Crocker v. Higgins*, 7 Conn. 342; *Jones v. Peterman*, 3 S. & R. 545; *Harris v. Knickerbacker*, 5 Wend. 636.

(72) See *Wetmore v. White*, 2 Caines' Cas. in Error, 87. *Billington v. Welsh*, 5 Binn. 131. *Smith v. Patton's Les.* 1 Serg. & Rawle, 80. *Bassler v. Niesly*, 2 Serg. & Rawle, 355. *Thompson v. Tod*, 1 Peters' Rep. 388. *Jackson v. Culright*, 5 Munf. 308.

to the statute of frauds, and appear to be applicable to the point under consideration; for equity, even before the statute of frauds, would not execute a mere parol agreement not in part performed. In the first case (*x*), which was heard in the 38th of Eliz. relief was denied, "because it was but a preparation for an action upon the case." In the two next cases(*y*), which came on in the 9th of Jac. I., parol agreements were enforced, apparently on account of the payment of very trifling parts of the purchase-money, but the particular circumstances of these cases do not appear. The last case reported in Tothill(*z*), was decided in the 30th of Jac. I., and the facts are distinctly stated. The bill was to be relieved concerning a promise to assure land of inheritance, of which there had not been any execution, but only 55s. paid in hand, and the bill was dismissed. This point received a similar determination, in the next case on the subject before the statute, which is reported in Cha. Rep.(*a*), and was determined in the 15th Cha. II. So the same doctrine was adhered to in a case which occurred three years afterwards, (*) and is reported in Freeman(*b*); for although a parol agreement for a house, with 20s. paid, was decreed without further execution proved, yet it appears by the judgment, that the relief would not have been granted if the defendant, the vendor, had demurred to the bill, which he had neglected to do, but had proceeded to proof. The last case I have met with previously to the statute, was decided in the 21st Car. II.(*c*), and there a parol agreement, upon which only 20s. were paid, was carried into a specific execution. This case probably turned, like

(*x*) William v. Nevil, Toth. 135.

(*y*) Ferne v. Bullock, Toth. 206; Clark v. Hackwell, *ibid.* 228.

(*z*) Miller v. Blandist, Toth. 85.

(*a*) Simmons v. Cornelius, 1 Cha. Rep. 128.

(*b*) Anon. 2 Freem. 128.

(*c*) Voll v. Smith, 3 Cha. Rep. 16.

the one immediately preceding it, on the neglect of the defendants to demur to the bill. It must be admitted, that the foregoing decisions are not easily reconcileable, yet the result of them clearly is, that payment of a trifling part of the purchase-money was not a part-performance of a parol agreement. Whether payment of a considerable sum would have availed a purchaser, does not appear. In Toth. 67, a case is thus stated: "Moyl v. Horne, by reason 200*l.* was deposited towards payment, decreed." This case may, perhaps, be deemed an authority that, prior to the statute, the payment of a substantial part of the purchase-money would have enabled equity to specifically perform a parol agreement; but it certainly is too vague to be relied on.

Our attention is now called to the statute itself. The clause relating to lands declares generally, that no contract, not in writing, shall be binding; there is also a clause in the act, which relates to sales of goods, which are declared to be binding if something is given in earnest to bind the bargain.

The first case in the books, subsequently to the statute, is in Freem.(*d*), where it is stated, that a contract for land, (*)and *a great part* of the money paid, is void since the statute of frauds and perjuries; but the party that paid the money may, in equity(*I*), recover back the money(73).

(*d*) 1 Freem. 486. ca. 664. b.

(*I*) At this day it may be recovered at law.

(73) At this day it may be recovered at law. [See *Gillet v. Maynard*, 5 Johns. Rep. 85; *Sherburne v. Fuller*, 5 Mass. Rep. 133. In *Pennsylvania*, it has been decided, that an action at law, would lie to recover damages accruing from the non-performance of a contract for the sale of lands, which, being within the statute of frauds, could not be decreed in specie. *Bell v. Andrews*, 4 Dall. 152. See also, *Phillips v. Thompson*, 1 Johns. Ch. Rep. 131.]

In *Sherburne v. Fuller*, which was an action upon a contract touch-
(*120)

And for this Freeman states he saw Sir William Jones' opinion under his hand. This was about four years after the act. The next case is *Leak v. Morrice(e)*, which occurred in the same year ; the bill was to have an agreement performed by the defendant ; which was, in effect, that the defendant should assign a term of years in his house and certain goods, for two hundred guineas, whereof he paid one in hand as earnest of the bargain, and three days after nineteen guineas more ; and part of the bargain was, that it should be executed by writings, by a certain time. The defendant pleaded the statute of frauds, and alleged the money was only paid for the lease, but confessed the receipt of the twenty guineas, and offered to repay them. Lord Keeper North said, it was clear that the defendant

(e) 2 Ch. Ca. 135 ; 1 Dick. 14.

ing the sale of lands ; and it being objected that it was within the statute, and that the contract was proved only by parol evidence. It was answered, that when a contract within the statute is rescinded, either party may demand of the other the repayment of the money advanced, or the return of the thing delivered under the contract, and may support such demand by parol evidence. Parsons, C. J. said, " This position is generally true ; and in this case, had the plaintiff advanced money to the defendant, or delivered him as bailiff a deed for safe custody, an action would have lain for the money or deed, or even trover for the deed, and parol evidence would support such action. But here the land was conveyed to Fuller by M., and the deed delivered to the former as evidence of his title : although he promised by parol that he would return it unrecorded, if the contract was rescinded ; and on the return and cancelling of the deed, it was understood that he would be divested of the land. A promise to return a deed under such circumstances is in our opinion a promise concerning the sale of lands, as the title to the land was intended to be changed by the performance of the promise. This defect of written evidence cannot be aided by the receipt in writing : for that instrument proves a contract to account for money, and the parol evidence, given to explain it, either contradicts the contract declared on, or materially varies it. As the Justice of the case is with the plaintiff, we see no reason why he may not declare on the receipt, as on a promise to pay money.

ought to repay the money, but overruled the plea on another ground. In this case it does not appear to have occurred to either the bar or the court, that payment of money would take a parol contract for lands out of the statute. The case of *Alsop v. Patten*(*f*), arose about fifteen years afterwards. There a joint lessee of a building lease agreed to sell his moiety to the other lessee for four guineas, and accepted a pair of compasses in hand to bind the bargain. The vendor pleaded the statute to a bill filed by the purchaser for a performance in specie. Lord Chancellor Jefferies ordered him to answer, and saved the benefit of the plea to the hearing, as the agreement was, in some part, executed. In this case, unless there was a part-performance of the agreement, independently of the mere delivery of the compasses, it is (*)clear that the Court confounded the section of the statute by which personal contracts are binding, if earnest is paid, with the clause relating to land. The next case is *Seagood v. Meale*(*g*), which arose thirty-four years after the case of *Alsop v. Patten*. The case was, that upon a parol agreement for sale of an estate for 150*l.*, a guinea was paid, and the payment of the guinea was agreed to be clearly of no consequence in case of an agreement touching lands or houses, the payment of money being only binding in cases of contracts for goods. In this case we find the doctrine laid down generally, that the payment of money is not a part-performance of a parol agreement for lands, and no distinction was taken, as seems sometimes to have been thought, between the payment of a substantial part of the purchase-money, and of a trifling portion. Then comes the case of *Lord Fingal, or Lord Pengal v. Ross*, which was decided by Lord Cowper,

(*f*) 1 Vern. 472.

(*g*) Prec. Cha. 560.

(*121)

in the 8th of Anne(*h*)(I). *A.* agreed with *B.* to make him a lease for twenty-one years of lands rendering rent, *B.* paying *A.* 150*l.* fine. *B.* paid 100*l.* in part, then *A.* refused to execute the agreement; and upon a bill filed for a specific performance, the agreement was held to be within the statute; but the 100*l.* was decreed to be refunded. The Lord Chancellor said, the payment of this 100*l.* was not such a performance of the agreement on one part, as to decree an execution on the other; for the statute of frauds makes one sort of contracts, viz. personal contracts, good, if any money is paid in earnest. Now that statute says, that no agreement concerning (*)lands shall be good, except it is reduced into writing; and therefore, a parol agreement, as it was in that case, would not be good by giving money by way of earnest. Thus far no room is left for doubt; but in *Lacon v. Mertins*(*i*), Lord Hardwicke laid it down, that paying money had always been considered as a part-performance. This, however, was a mere *dictum*; it was not necessary to decide the question; the cases on the subject were not cited; and another rule is laid down too generally in the same report. A case, indeed, is said to have been decided in 1750(*k*), at which time Lord Hardwicke was Chancellor, where the bill was to compel the *acceptance* of a lease under a parol agreement upon a fine of 150*l.* and 16*l.* paid in part of the same; and the plea was overruled, without hearing the counsel for the plaintiff, and the decision, it is said, appears by the Registrar's

(*h*) 2 Eq. Ca. Abr. 46. pl. 12.

(*i*) 3 Atk. 1.

(*k*) *Dickinson v. Adams*, 4 Ves. jun. 722, cited.

(I) It has been said, that this case is not to be found in the Registrar's book. See 4 Ves. jun. 721. The author himself has searched the Registrar's calendars for 1709 and 1710 without success. The search was made under the letters L. (the plaintiff being a lord) P. and F.

book(I). But it does not appear from this statement, whether there was or was not any other act of part-performance ; and it is a sufficient objection to this decision, that the plaintiff's counsel were not heard, as no one can deny that the point was open to argument. The next case is a recent one(*l*), in which Lord Rosslyn held that the payment of a small sum, as five guineas, where the purchase-money is 100*l.*, would not take the case out of the statute ; but he seemed clearly of opinion, that payment (*) of a considerable part of the purchase-money would be sufficient : and he treated the case of *Lord Fingal v. Ross* as ill determined. However, it was not necessary to decide the question. The opinion was clearly extra judicial. In the late case of *Coles v. Trecothick(m)*, where the purchase-money was 20,000*l.* and 2,000*l.* were paid in part, the point was treated at the bar as doubtful, and the Court evidently declined giving an opinion on the subject.

Upon the whole, it appears clearly, that since the statute of frauds, the payment of a small sum cannot be deemed a part-performance(74). The *dicta* are in favor

(*l*) *Main v. Melbourn*, 4 Ves. jun. 720.

(*m*) 8 Ves. jun. 234 ; *Ex parte Hooper*, 1 Mer. 7.

(I) The author has searched the Registrar's calendars for 1750, with great attention, but without success. He met with only one case where the plaintiff's name was Dickinson, and there the defendant's name was Baskerville ; and the case is on a different point. Reg. Lib. A. 1750, fol. 545. Neither does a case in the same book, fol. 514, by the name of *Dauids v. Adams*, embrace the point in question. The search was made under the letter A. as well as the letter D.—Note, the case perhaps turned on the principle stated in page 125, *infra*.

(74) If the agreement be executed, or even partly executed, the parties are not permitted to treat it as a nullity. The statute does not wholly vacate the contract, but only inhibits all actions brought to enforce it. Its operation is limited by construction to such executory contracts as have been in no substantial part executed. *Davenport v.*

(*128)

of a considerable sum being a part-performance, but this construction is not authorised by the statute, and it is op-

Mason, 15 Mass. 82. But it is not every part performance that will be sufficient. "I will not say, that according to adjudged cases, a parol lease for more than three years, may not be taken out of the act by delivery of possession. If attended with improvements by the lessee, it certainly would be established. To give weight to the possession, it must be a possession pursuant to the agreement. Therefore, where possession had been before a parol agreement for a lease for seven years it was held to be too doubtful to be considered as a part performance." *Jones v. Peterman*, 3 S. & R. 543. The principle is, that part performance will entitle the party to a decree for specific performance, if the acts of part performance were such as would not have been done, but for the agreement; and done with a view to perform it; and were also prejudicial to the party performing. Thus, in *Davenport v. Mason*, 15 Mass. 89., where the parties with others agreed to become interested in the purchase of lands; but the title was to be held by a part for the benefit of all. An agreement under seal was executed; but it omitted any provision in respect to the payment of the respective shares of the purchase money; but in a suit against the defendant for his proportion of the plaintiff's advances, held, that he was entitled to judgment. *Davenport v. Mason*, *Supra*.

It is clear that no action at law will lie on the parol contract itself. 1 Pick. 328. And a parol agreement to execute a defeasance to an absolute deed has been held to be no ground of action at law; and the court said that "Chancery could afford no relief in this case; for the deed was made and delivered according to the intent of the parties; and the breach of promise is no more fraudulent than any other breach of trust or promise." *Boyd v. Stone*, 11 Mass. 342.

Where a tenant for life permitted the plaintiff to cut a ditch through her land, to supply his mill with water; and the former dying, the latter made a verbal agreement with the remainder man to purchase the ditch; and the purchase money to be ascertained by an award of arbitrators. The award having been made, the plaintiff sued his bill for a specific performance of the agreement; but the court dismissed the bill, on the ground that there was no part performance. *Hamilton v. Jones*, 3 Gill & J. 127. But the public may acquire an interest in land; an easement, by the consent of the owner, without writing; for it is by operation of law: And a contract to pay for land occupied as a road is a valid contract. 8 Johns. 256; S. P. 10 ib. 109. Before the R. S. no writing was necessary to give consent to lay out a road or to relinquish the damages: And where the defendant promised to pay the

posed by a case, in which the contrary was decided, upon the most convincing grounds. On this subject, Sir William Grant's admirable judgment in *Butcher v. Butcher*(*n*), must occur to every discerning mind ; it turns on a subject so applicable to the present, that his arguments, with a slight alteration, directly bear upon it. To say that a *considerable* share of the purchase-money must be given, is rather to raise a question than to establish a rule. What is a considerable share, and what is a trifling sum ? Is it to be judged upon a mere statement of the sum paid, without reference to the amount of the purchase-money?— If so, what is the sum that must be given to call for the interference of the Court ? What is the limit of amount at which it ceases to be trifling, and begins to be substantial ? If it is to be considered with reference to the amount of the purchase-money, what is the proportion which ought to be paid ? Mr. Booth also was impressed with this difficulty, although his sentiments are not so forcibly (*)expressed. Where, he asks, will you strike the line ? And who shall settle the quantum that shall suffice in payment of part of any purchase-money, to draw the case

(*n*) 9 Ves. jun. 382.

plaintiff a certain price for his verbal relinquishment of damages against the public, he was held liable to pay the stipulated damages. *Noyes v. Chapin*, 6 Wend. 461.

A parol agreement to share in the profits of a speculation in land is said not to be within the statute of frauds. 4 Conn. R. 568. No interest in lands shall pass otherwise than by deed or writing : but if one holds land in trust for another ; and agrees verbally to sell and account for the proceeds of the sale, this agreement is not within the statute. Thus, in *Hess v. Fox*, 10 Wend. R. 436, where the mortgagee agreed to pay over to the mortgagor the surplus ; the latter having released his right to redeem : held, that he was entitled to his action immediately upon the sale. "No question can arise here as to the validity of the agreement to sell ; for that was performed, and it only remains to pay over the money, supported by the consideration of land conveyed to the promisor."

(*124)

out of the statute ; or ascertain what shall be deemed so trifling as to leave the case within it ?(o)(75).

Since the above observations were written, a decision of Lord Redesdale's has appeared, in which he held clearly that payment of purchase-money is not a part-performance ; and although his Lordship did not advert to all the cases on the subject, yet it is sincerely to be hoped that his decision will put the point at rest. He said, that it had always been considered that the payment of money is not to be deemed a part-performance, to take a case out of the statute. *Seagood v. Meale* is the leading case on that subject : there a guinea was paid by way of earnest ; and it was agreed clearly, that that was of no consequence in case of an agreement touching lands. Now, if payment of fifty guineas would take a case out of the statute, payment of one guinea would do so equally ; for it is paid in both cases as part-payment, and no distinction can be drawn(p) : but the great reason, he added, why part-payment does not take such an agreement out of the statute, is, that the statute has said, that in another case, viz. with respect to goods, it shall operate as a part-performance. And the Courts have therefore considered this as excluding agreements for lands, because it is to be inferred, that when the Legislature said it should bind in case of goods, and were silent as to the

(o) 1 Ca. and Opin. 136.

(p) See acc. *Cordage v. Cole*, 1 Saund 319.

(75) See *Smith v. Patton's Les.* 1 Serg. & Rawle, 80. *Jackson v. Culright*, 5 Munf. 308. *Welmores v. White*, 2 Caines' Cas. in Error, 87. *Bell v. Andrews*, 4 Dall. 152. In *Thompson and Tod*, 1 Peters' Rep. 388. WASHINGTON, J. says, " although it should be admitted, that under all the circumstances of this case, payment of a part of the purchase money will amount to a part performance, still, it should appear beyond all reasonable doubt, that the payment was understood by the parties, to have been so made and intended."

case of lands, they meant that it should not bind in the case of lands(*q*).

But, even admitting that the payment of purchase-money may be deemed a part-performance, yet the payment (*) of the auction duty, however considerable, will not enable the Court to decree a specific performance of a parol agreement; as the revenue laws cannot be held to operate beyond their direct and immediate purpose, to affect the property and vary the rights of the parties not within the intention of the act(*r*).

In some cases it has been decided, that acts done by the defendant to his own prejudice, could be made a ground for compelling him to perform the agreement; but in a late case(*s*), Sir William Grant held the contrary, where there is no prejudice to the plaintiff, because the ground on which the Court acts, is fraud in refusing to perform, after performance by the other party(*t*); but where the defendant has, for instance, paid the auction duty or purchase-money, it is no fraud on the vendor, *but a loss to himself*, which ought not to be made a ground for a specific performance against himself.

Where a person purchases several lots of an estate, included in distinct articles of sale, a part-performance as to one lot will not be deemed a part-performance as to the other lots, and will therefore only take the agreement out of the statute as to the lot in respect of which there was a part-performance(*u*).

(It may happen, that although an agreement be in part

(*q*) *Clinan v. Cooke*, 1 Scho. & Lef. 22; and see *O'Herlihy v. Hedges*, *ib.* 123; 14 Ves. jun. 388.

(*r*) *Buckmaster v. Harrop*, 7 Ves. jun. 341; 13 Ves. jun. 456.

(*s*) *Buckmaster v. Harrop*, *ubi sup.* See *Hawkins v. Holmes*, 1 P. Wms. 770; and see *post*, ch. 4, n. observations on *Potter v. Potter*.

(*t*) See *Popham v. Eyre*, Lofft, 786; *Clinan v. Cooke*, 1 Scho. & Lef. 22; and *O' Herlihy v. Hedges*, *ibid.* 123.

(*u*) *Buckmaster v. Harrop*, 7 Ves. jun. 341.

(*125)

performed, yet the Court may not be able to ascertain the terms, and then it seems the case will not be taken out of the statute. If, however, the terms be made out (*)satisfactorily to the Court, contrariety of evidence is not material(x), and the Court will use its utmost endeavors to get at the terms of the agreement(76).

In the case of *Mortimer v. Orchard*(y), where a parol agreement with two persons had been in part performed, the plaintiff's witness proved an agreement different from that set up by the bill, and the defendants stated an agreement different from both. The Chancellor thought in strictness the bill ought to be dismissed; but as there had been an execution of some agreement between the parties, and there were two defendants who proved the agreement set up by their answers, he decreed a specific performance of the agreement confessed by the answers(77).

In one case where, upon the faith of a parol agreement, a man entered and built, it was proved that the defendant told the plaintiff that his word was as good as his bond, and promised the plaintiff a lease when he should have renewed his own from his landlord. Lord Chancellor Jefferies said, that the defendant was guilty of a fraud, and ought to be punished for it; and so decreed a lease to the plaintiff, *though the terms were uncertain*. It was, he said, in the plaintiff's election for

(x) See 1 Ves. 221.

(y) 2 Ves. jun. 243. See *Lindsay v. Lynch*, 2 Scho. & Lef. 1.

(76) See *Rowton v. Rowton*, 1 Hen. & Munf. 92. See also, the opinion of KENT, Chancellor, in *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. Rep. 281. and *Phillips v. Thompson*, 1 Johns. Ch. Rep. 149. *Abeel v. Radcliff*, 13 Johns. Rep. 297.

(77) See *Colson v. Thompson*, 2 Wheat. 336. *Neufville v. Mitchell*, 1 Des. 480. *Phillips v. Thompson*, 1 Johns. Ch. Rep. 131. *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. Rep. 273. *Givens v. Calder*, 2 Des. 188. See also, *Colson v. Thompson*, ut supra, note a. 341; and *Morgan v. Morgan*, 2 Wheat. 302., note d.

what time he would hold it, and he elected to hold during the defendant's term at the old rent, but the *plaintiff* was to pay costs(z).

And in a case from Yorkshire, possession having been delivered in pursuance of a parol agreement, and a dispute arising upon the terms of the agreement, Lord Thurlow sent it to the Master, upon the ground of the possession being delivered, to inquire what the agreement was. The difficulty was in ascertaining what the terms were. The Master decided as well as he could, and then the (*)cause came on before Lord Rosslyn, upon further directions, who certainly seemed to think Lord Thurlow had gone a great way, and either drove them to a compromise, or refused to go on with the decree upon the principle upon which it was made(a).

Lord Thurlow, however, appears to have formed a settled opinion upon this point. For in *Allan v. Bower*(b), where his Lordship considered the written memorandum as evidence of a parol agreement, which was in part performed (whether rightly or not(c) is immaterial to the present question), he directed the Master, *who had refused to admit parol evidence*, to inquire and state what the promise was, that was mentioned in the memorandum, and at what time the promise was made, *and what interest the tenant was to acquire in the premises under such promise*; and the Master was to be at liberty to state specially any particular circumstances that might arise on such inquiries, and the parties were to be examined on interrogatories. In consequence of this order, evidence was received, which proved that the tenant was to hold during his life; and Lord Thurlow decreed a lease to be executed accordingly.

(z) Anon. 5 Vin. Abr. 523, pl. 40; and see Anon. *ib.* 522. pl. 38.

(a) Anon. 6 Ves. jun. 470, cited by Lord Eldon.

(b) 3 Bro. C. C. 149.

(c) See 1 Sch. & Lef. 37.

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So in a case before Lord Redesdale, where an agreement in writing was held to be within the statute, because the term for which it was to be granted was not expressed, his Lordship said, he should have had great difficulty if there were evidence of part-performance. *He must have directed a further inquiry*, for the party had not suggested by his bill, that the agreement was for any specific term, and the case stood both on the pleadings and evidence imperfect on that head(*d*). And in a late case before Lord Eldon, he thought the Court must at least (*)endeavor to collect, if they can, what are the terms the parties have referred to(*e*).

But in the case of *Symondson v. Tweed*(*f*), it was laid down, that in all cases wherever the Court had decreed a specific execution of a parol agreement, yet the same had been supported and made out by letters in writing, *and the particular terms stipulated therein*, as a foundation for the decree; otherwise the Court would never carry such an agreement into execution. And in a case before the late Lord Alvanley, when Master of the Rolls(*g*), he is reported to have said, "I admit my opinion is, that the Court has gone rather too far in permitting part-performance, and other circumstances, to take cases out of the statute, and then, unavoidably perhaps, after establishing the agreement, to admit parol evidence of the contents of that agreement. As to part-performance, it might be evidence of some agreement, but of what, it must be left to parol evidence. I always thought the Court went a great way. They ought not to have held it evidence of an unknown agreement, but to have had the money laid out repaid. It ought to have

(*d*) *Clinan v. Cooke*, 1 Scho. & Lef. 22.

(*e*) *Boardman v. Mostyn*, 6 Ves. jun. 467.

(*f*) *Prec. Cha.* 374; *Gilb. Eq. Rep.* 35.

(*g*) *Forster v. Hale*, 3 Ves. jun. 712, 713.

been a compensation. Those cases are very dissatisfactory. It was very right to say, the statute should not be an engine of fraud, therefore compensation would have been very proper. They have, however, gone farther, saying, it was clear that there was some agreement, and letting them prove it; but how does the circumstance of having laid out a great deal of money, prove that he is to have a lease of ninety-nine years? The common sense of the thing would have been to have let them bring an action for the money. I should pause upon such a case." And Lord Eldon has said, that perhaps if it was *res (*)integra*, the soundest rule would be, that if the party leaves it uncertain, the agreement is not taken out of the statute sufficiently to admit of its being enforced.

In a late case in Ireland, where after a part-performance of a parol agreement the purchaser died, and there was no evidence of the amount of the price agreed on, or of the quantity of estate to be conveyed, Lord Manners refused to grant a reference for the purpose of ascertaining the terms of the contract. There was, his Lordship said, no evidence whatever of the terms, and the reference was sought to supply the entire absence of this very material part of the case. Where there is contradictory evidence in a case that raises a doubt in the mind of the Court; that is to say, where the case is fully proved by the party on whom the onus of proof lay, but that proof shaken or rendered doubtful by the evidence on the other side, there the Court will direct a reference or an issue to ascertain the fact; but where there is no evidence whatever, would it not, he asked, be introducing all the mischiefs intended to be guarded against by the rules of the Court, in not allowing evidence to be gone into after publication, and holding out an opportunity to a party to supply the defect by fabricated evidence, if he were to direct such an inquiry? He therefore did not think him-

self at liberty from the evidence in the case to direct the reference or issue desired(*h*).

And in a later case(*i*), a bill for a specific performance was dismissed with costs because the agreement was by parol, and although part-performed, the terms of it could not be made out by reason of the variance between the witnesses for the plaintiff.

(*)We cannot but observe the growing reluctance manifested to carry parol agreements into execution, on the ground of part-performance, where the terms do not distinctly appear; and although, according to many authorities, the mere circumstance of the terms not appearing, or being controverted by the parties, will not, of itself, deter the Court from taking the best measures to ascertain the real terms(*j*); yet the prevailing opinion requires the party seeking the specific performance in such a case to show the distinct terms and nature of the contract. We may however remark, that it rarely happens that an agreement cannot be distinctly proved where the estate is sold. Most of the cases on this head have arisen on leases, where the covenants, &c. are generally left open to future consideration.

Where a parol agreement is so far executed as to entitle either of the parties to require a specific execution of it, it will be binding on the representatives of the other party in case of his death, to the same extent as he himself was bound by it(*k*)(78).

In a case before Lord Redesdale(*l*), he held that a

(*h*) *Savage v. Carroll*, 1 Ball & Beatty, 265. See *ibid.* 404, 550, 551.

(*i*) *Reynolds v. Waring*, 1 You. 346.

(*j*) See *Savage v. Carrol*, 2 Ball & Beat. 444.

(*k*) *Vide infra*, ch. 4.

(*l*) *Shannon v. Bradstreet*, 1 Scho. & Lef. 52; *Lowe v. Swift*, 2 Ball & Beat. 529.

(78) See *Grant v. Craigmiles*, 1 Bibb. 203.

contract by a tenant for life with a power of leasing, to grant a lease under his power, was binding on the remainder-man. In the course of the argument, a question was put from the bar, whether, if this had been a case of a parol agreement in part performed, it could be enforced? In answer to which, Lord Redesdale expressed himself thus: "That, I think, would raise a very distinct question, a question upon the statute of frauds; and perhaps a remainder-man might be protected by the statute, though the tenant for life would not. For the (*)party himself is bound by a part-performance of a parol agreement, principally on the ground of fraud, which is personal. Such a ground could scarcely be made to apply to the case of a remainder-man, unless money had been expended, and there had been an acquiescence after the remainder vested, which were held by Lord Hardwicke, in *Stiles v. Cowper*, 3 Atk. 692, in the case of an actual lease under a power, but with covenants not according to the power, to bind the remainder-man to grant a lease for the same term with covenants according to the power."

In a case where it was alleged on the one side, that under a parol agreement the purchase-money had been paid and possession delivered; and on the other, that there was no sale, but that possession was delivered to make a qualification, and the alleged purchaser was a mere agent, and both the seller and purchaser were dead; an issue was directed whether the purchaser was, at his death, beneficially entitled to the premises in question(*m*).

These remarks may be closed by observing, that equity seems to have been guided by nearly the same rules in compelling a specific performance of parol agreements

(*m*) *Burkett v. Randall*, 3 Mer. 466.

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before the statute(*n*), as have been adhered to since; but still, the student cannot be too cautious in distinguishing the cases which were decided before the statute from those decided subsequently. Much confusion has arisen from inattention to this point.



(*)SECTION IV.

Of the Admissibility of Parol Evidence to vary or annul Written Instruments.



OF this learning we may treat under three heads, 1st, where there is not any ambiguity in the written instrument; 2dly, where there is an ambiguity; and, 3dly, where a term of an agreement is omitted or varied in the written instrument by mistake or fraud.—And,

I. Previously to the statute of frauds, parol evidence might have been given of collateral and independent facts, which tended to support a deed. Thus, although a valuable consideration was always essential to the validity of a bargain and sale, yet Rolle laid it down, that(*o*) upon *averment* that the deed was in consideration of money, or other valuable consideration given, the land should pass, because the averment was consistent with the deed. The same rule has prevailed since the statute of frauds. Where in a conveyance 28l. only were stated

(*n*) See *Miller v. Blandist*, Toth. 85; *Willam v. Nevil*, *ibid.* 135; *Ferne v. Bullock*, *ibid.* 200, 238; *Clark v. Hackwell*, *ibid.* 260; *Simmons v. Cornelius*, 1 Cha. Rep. 128; *Anon.* 2 Freem. 128; *Voll v. Smith*, 3 Cha. Rep. 16; and see *Marquis of Normanby v. Duke of Devonshire*, 2 Freem. 217.

(*o*) 2 Ro. Abr. 786.(N.) pl. 1; and see 1 Rep. 176, a.

parties by *parol*, that Ansell should not only have the hay from off Boreham Meadow, but also the possession of the soil and produce of that and another close of land. The cause was tried at *nisi prius* before Lord Mansfield, who admitted the evidence, and afterwards reported that he was not dissatisfied with the verdict in consequence of it. But Lord Chief Justice De Grey, and the other Judges of the Court of Common Pleas, held decidedly, that the evidence was totally inadmissible, as it annulled and substantially altered and impugned the written agreement(81).

(81) A vendor of land in several lots was unable to give a title to one, whereupon the vendee agreed by *parol* to waive the title as to that lot. This agreement cannot be set up against the original contract in writing. The judgment contains many observations on the power of varying contracts in writing, by subsequent *parol* agreements, and a distinction between contracts in writing under the statute of frauds and other contracts in writing. Parke, J. stated that he never could understand the principle upon which *Cuff v. Penn*, 1 M. & S. 21. and similar cases proceeded. *Goss v. Lord Nugent*, 5 B. & Ad. 58; 3 Nev. & Man. 28. S. C.

It is true as a general rule that any verbal agreement before the making of the writing is not to be received in evidence; but the writing alone is to be looked to as the evidence of the final agreement. In *Gerrish v. Washburn*, 9 Pick. 338, where the defendants gave an accountable receipt for money received of the plaintiffs; and this action being brought to recover the money, the defendants at the trial offered to prove, that before the execution of the receipt, the plaintiff being indebted to one W.; and the latter indebted to the defendants, agreed that the latter might arrange the payment of the money mentioned in the receipt with W.: And that the receipt was made in execution of the contract:—but the Judge rejected the evidence. The whole Court granted a new trial; and held that it was admissible; for the writing was neither a promissory note, nor a mere receipt. “We view it, said the chief justice, in neither of these lights, or rather in both. The promise made in the receipt may be performed otherwise than by paying over the money to the plaintiff, and in any way conformable to the intention of the parties.”

The maxim that a sealed contract cannot be avoided or waived but by an instrument of a like nature; or generally, that a contract under

So in *Preston v. Merceau*(1), by an agreement in writing a house was let at 26*l.* a year ; and the landlord attempted

(1) 2 Blackst. 1249.

seal cannot be avoided or altered or explained by parol evidence, like other maxims has received qualifications, and indeed was never true to the letter, for at all times, a bond, covenant or other sealed instrument might be defeated by parol evidence of payment, accord and satisfaction, &c. Therefore, in *Munroe v. Perkins*, 9 Pick. 298. where the action was *assumpsit*, for work, materials, &c. done and furnished by the plaintiff for the defendant. The defence set up was, that the work was done and the materials were furnished on a special contract under seal made by the defendant and Payne on behalf of themselves and other subscribers to the building ; and such a contract was produced in evidence. The plaintiff showed that being unable to go on with the contract without loss, defendants promised him to make him whole ; and upon this assurance the work was done without regard to the special contract. The Court held, that the plaintiff was entitled to recover. "The parol promise, it is contended, was without consideration. This depends entirely on the question, whether the first contract was waived. The plaintiff having refused to perform the contract, as he might do, subjecting himself to such damages as the other parties might show they were entitled to recover, he afterwards went upon the faith of the new promise and finished the work. This was a sufficient consideration. If the defendants were willing to accept his relinquishment of the old contract, the law we think will not prevent it."

So in *Lattimore et al v. Harsen*, 14 Johns. R. 330, where the plaintiffs had stipulated to perform certain work for a stipulated sum, under a penalty. Having entered upon the performance of it, they refused to perform, whereupon the defendant, by parol, released them from their covenant, and promised, if they would complete the work, to pay them by the day. The Court held the new contract to be binding. This doctrine was also recognized in the subsequent case of *Dearborn v. Cross*, 7 Cowen, 48, where a parol agreement executed was held to discharge a bond or other specialty. The cases of *Fleming v. Gilbert*, 3 Johns. 358 ; *Keating v. Price*, 1 J. Cas. 22 ; *Edwin v. Saunders*, 1 Cowen, 250. In *Ballard v. Walker*, 3 J. Cas. 64, lapse of time alone was held to be a waiver of the contract.

Where there is an agreement in writing, it merges all parol agreements and previous conversations ; but there are many cases we have seen in which a new parol contract is admitted to be proved. And there is a distinction between a suit upon the written contract itself, in

(*)to show, by parol evidence, that the tenant had agreed to pay the ground-rent for the house to the original landlord, over and above the 26*l.* a year; but the Court of Common Pleas rejected the evidence.

And upon the general rule of law, as it seems, independently of the statute of frauds, it has been determined that verbal declarations by an auctioneer in the auction-room, contrary to the printed conditions of sale, are inadmissible as evidence,(82) unless perhaps the purchaser has particular personal information given him of the mistake in the particulars(*u*).

In a late case(*v*), upon the sale of timber by a written particular, which was silent as to the quantity, it was attempted to show, that the auctioneer verbally warranted the quantity to be eighty tons, and it was insisted that this evidence was admissible, because it did not *contradict* the particular, but merely supplied its defect in not

(*u*) *Gunnis v. Erhart*, 1 H. Blackst. 269. See 13 Ves. jun. 471. and *infra*; and *Fife v. Clayton*, 13 Ves. jun. 546; *Higginson v. Clowes*, 15 Ves. jun. 516.

(*v*) *Powell v. Edmunds*, 12 East, 6; *Jones v. Edney*, 3 Camb. 285.

which case it has been held that parol evidence shall not be received: and a suit brought on the ground of a new subsequent agreement not in writing: in the latter case parol evidence is admitted. *Duncan, J.* in *Le Fevre v. Le Fevre*, 4 S. & R. 241. said "a party may be admitted to prove by parol evidence, that after signing a written agreement, the parties made a verbal agreement, varying the former, provided their variations have been acted upon, and the original agreement can no longer be enforced without a fraud on one party." Parol evidence was admitted in that case to prove an alteration of the course of an aqueduct established by deed. The evidence was not offered for the purpose of contradicting the deed, but to show a substitution of another spot. And as was well remarked by the learned Judge, "if this had not been carried into effect, the evidence would not have been admissible; but where the situation of the parties is altered, by acting upon the new agreement, the evidence is proper."

(82) See *Wright's Les. v. Deklyne*, 1 Peters' Rep. 199, 204. See also, *Wainwright v. Read*, 1 Des. 573.

(*134)

stating the quantity. But it was held that the evidence was not admissible(83). Lord Ellenborough said, that the purchaser ought to have had it reduced into writing at the time, if the representation then made as to the quantity swayed him to bid for the lot. If the parol evidence were admissible in this case, he knew of no instance where a party might not, by parol testimony, superadd any term to a written agreement, which would be setting aside all written contracts, and rendering them of no effect. There was no doubt, his Lordship added, that the warranty as to the quantity of timber would not vary the agreement contained in the written conditions of sale.

So, since the act of parliament for altering the style, a demise from Michaelmas must be taken to be from (*)new Michaelmas, and parol evidence cannot be admitted to show that the parties intended it to commence at old Michaelmas(*x*), unless the demise is by parol(*y*).

The rules of evidence are universally the same in courts of law and equity. Therefore parol evidence, which goes to substantially alter a written agreement, cannot be received in a court of equity any more than in a court of law(*z*)(84).

(*x*) *Doe v. Lea*, 11 East, 312.

(*y*) *Doe v. Benson*, 4 Barn. & Ald. 588.

(*z*) See 3 Wils. 276 ; and see *Foot v. Salway*, 2 Cha. Ca. 142.

(83) See *Wright's Les. v. Deklyne*, 1 Peters' Rep. 199, 204. See also *Wainwright v. Read*, 1 Des. 573.

(84) See *Dwight v. Pomeroy*, 17 Mass. Rep. 303. *Movan v. Hays*, 1 Johns. Ch. Rep. 443, Per KENT, Chancellor. *Holmes v. Simons*, 3 Des. 149, 152. *Dupree v. M'Donald*, 4 Des. 209.

"Indeed it would be strange that, in any country, there should be independent tribunals, having jurisdiction over the same subject matter, which should act upon such different principles, as that a contract should be valid in one and void in the other. One may have forms and processes to enforce a contract, which the other may want ; but it would seem impossible that the contract itself should be valid or invalid, according to the form in which it should be discussed. But were it otherwise in England, or in New York, as some of the cases tend to

Thus in the case of *Lawson v. Laude*(a), a bill was brought to carry into execution an agreement between the plaintiff and defendant, for granting to the defendant a lease of a farm. The defendant objected to execute the lease, because some land, called Oxlane, agreed to be demised, was left out of the lease. The plaintiff offered evidence to prove, that it was left out by the particular and joint direction of the plaintiff and defendant. Sir Thomas Clarke held the evidence to be in direct contradiction to the statute of frauds, and therefore dismissed the bill.

So in a case before Lord Bathurst(b), the bill was filed for an injunction to stay proceedings at law for a breach of covenant, in not assigning *all* the premises, which the defendant insisted, by an agreement in writing, and a lease in pursuance of it, were to be assigned. The plaintiff stated by his bill, that though the agreement was for *all* the premises, yet the defendant, at the time of the execution of the lease, agreed that three pieces of land should be excepted, and the plaintiff examined several witnesses to prove the fact, which they did; but the defendant by his answer denied the fact, and insisted (*) upon the extent of the written agreement; and the

(a) 1 Dick. 346.

(b) *Fell v. Chamberlain*, 2 Dick. 484. I could not meet with the facts in the Registrar's book; see Reg. Lib. A. 1772, fol. 1. 496.

shew (2 J. Ch. R. 585; 7 Johns. 373.) it would by no means follow that, in this commonwealth, the same doctrine would be received." (Per Parker C. J. in *Dwight v. Pomeroy*.) He added, "there are but two cases, in which parol evidence can be admitted, to control the effect of a deed or written contract, in itself complete and intelligible. One is fraud, of which the injured part may avail himself at law as well as in equity; and the other is where application is made in equity to enforce a written contract; the adverse party in the latter case may show that the instrument relied on does not contain the true agreement of the parties, or the whole of it. In the latter case equity may refuse the exercise of its powers, unless justice is done to the other party.

(*136)

parol evidence being objected to at the hearing, it was not permitted to be read.

And in an important case before Lord Eldon(c), his Lordship refused to execute an agreement with a variation attempted to be introduced by parol, on the ground of mistake, or at least of surprise, which was denied, by the answer. So in the late case of *Woollam v. Hearn*(d), where a specific performance was sought of an agreement for a lease, at a less rent than that mentioned in the agreement, which variation was introduced by parol, on the ground of fraud and misrepresentation in the landlord; the evidence was read without prejudice, and the Master of the Rolls thought it made out the plaintiff's case; but his Honor held himself bound by the authorities, and accordingly rejected the evidence, and dismissed the bill. And this doctrine has been distinctly recognized by Lord Redesdale(e).

So verbal declarations, in opposition to printed conditions of sale, are inadmissible as evidence in equity as well as at law(f).

And if a material term be added by one party to a written agreement after its execution, he destroys his own rights under the instrument. But although this doctrine has been referred to the statute of frauds, yet it seems rather to depend on the principles of the common law(g).

In the late case of *Besant v. Richards*(h), where the

(c) *Marquis of Townshend v. Stangroom*, 6 Ves. jun. 328. See 1 Ves. & Bea. 526, 527.

(d) 7 Ves. jun. 211.

(e) 1 Scho. & Lef. 39.

(f) *Jenkinson v. Pepys*, 6 Ves. jun. 330, cited; 15 Ves. jun. 521; 1 Ves. & Bea. 528; see 15 Ves. jun. 171, 546; *Higginson v. Clowes*, 15 Ves. jun. 516.

(g) *Powell v. Divett*, 15 East, 29.

(h) 1 Tomlyn 509.

purchaser was plaintiff, the contract described the property (*)as held by one Watson, and the sale was to be completed at Michaelmas. Watson held an agreement for a lease for ten years, but the seller represented to the purchaser that this agreement was void, and that he had served Watson with notice to quit at Michaelmas, and that he would give possession at that time. The tenant refused to quit, and the Master of the Rolls held that the purchaser ought not to be bound by the agreement, purchasing as he did on the faith of that representation. He was entitled to be released from the agreement altogether, or if he chose he might perform it and have compensation, and the plaintiff electing to perform the agreement with a compensation, a decree was made accordingly; but it seems difficult to sustain this decision consistently with the authorities, although there might have been sufficient ground to have released the purchaser altogether.

But when equity is called upon to exercise its peculiar jurisdiction, by decreeing a specific performance, *the party to be charged* is to be let in to show, that, under the circumstances, the plaintiff is not entitled to have the agreement specifically performed(i)(85).

Therefore a defendant resisting a specific performance of an agreement, may prove by parol evidence, that by fraud the written agreement does not contain the real terms(j). Such evidence was admitted by Lord Hard-

(i) See 7 Ves. jun. 219.

(j) See the cases cited *infra*, as to discharging or varying a written agreement by parol; and see *Walker v. Walker*, 2 Atk. 98; and see 6 Ves. jun. 334, n.

(85) See *Stevens v. Cooper*, 1 Johns. Ch. Rep. 425. *Botsford v. Burr*, 2 Johns. Ch. Rep. 405. *Gillespie v. Moon*, 2 Johns. Ch. Rep. 585. In *Maryland*, it has been determined, in an action at law, on a bond for the purchase-money of lands, that parol evidence cannot be given by a witness, to shew, that he was seized of part of the lands sold, in order to rebut the claim of the vendor. *Sharpe v. Gibson*, 1 Har. & Johns. 447.

(*137)

* In this case Chancellor Kent discards the distinction made by Eng. authorities between the case of a plaintiff seeking a reform of the instrument then performance and that of a defendant re-

wicke in *Joynes v. Statham*(*k*); and in the case of *Woollam v. Hearn*(*l*), before cited, the Master of the Rolls said, that if it had been a bill brought by the defendant for a specific performance, he should have been (*)bound by the decisions to admit the parol evidence, and to refuse a specific performance.

So Lord Hardwicke admitted, that an omission by mistake or surprise, would let in the evidence as well as fraud; and Lord Eldon actually admitted parol evidence of surprise, as a defence to a bill seeking a performance in specie; but his Lordship said, that those producing evidence of mistake or surprise, in opposition to a specific performance, undertake a case of great difficulty(*m*). In a later case, the Master of the Rolls admitted parol evidence on behalf of a defendant, to show a parol promise at the time of signing the agreement to vary the terms of it, and upon the evidence he dismissed the bill for a specific performance of the written agreement(*n*)(86).

(*k*) 3 Atk. 338.

(*l*) 7 Ves. jun. 211.

(*m*) *Marquis of Townshend v. Stangroom*, 6 Ves. jun. 328.

(*n*) *Clarke v. Grant*, 14 Ves. jun. 519; and see 15 Ves. jun. 523.

(86) Parol evidence collateral to an agreement is admissible: but no evidence of matter *dehors* was admissible to alter the terms and substance of the contract. In *Clarke v. Grant*, 14 Ves. 510, the parol evidence admitted was of a stipulation entered into by the defendant prior to, and as a condition precedent to the execution of the agreement: and it did not seek to vary the substance of the agreement: Here the purpose of the parol evidence was to show the transaction conducted on the basis of an exchange. *Croome v. Lediard*, 2 M. & R. Ch. R. 261.

The expression 'deed of conveyance' was, it seems, explained by parol evidence to mean, when inserted in articles of agreement, "a deed conveying the land free of all incumbrances." Subsequent decisions, however, consider the correctness of this decision doubtful. The case of *Zantinger v. Ketch*, 4 Dall. R. 132. therefore, in which the decision was had, if not overruled, is certainly opposed to the rule that

And where lands, which upon admeasurement did not contain thirty-six acres, were described in a particular to contain forty-one acres by estimation, were the same more or less, and the purchaser in answer to a bill for a specific performance set up parol declarations of the auctioneer that he sold it for forty-one acres, and if it was less an abatement should be made, his Honor admitted the evidence and dismissed the bill, because after such a declaration made by the auctioneer, it was fraudulent and unfair in the seller to insist upon the execution of the contract, not giving the defendant the benefit of that declaration(o).

So where by the *mistake* of the solicitor the agreement only required the purchaser to bear the expense of the conveyance, whereas the real agreement was, that he should also bear the expense of making out the title, the Master of the Rolls admitted parol evidence of the real agreement and of the mistake(87); and upon the strength of (*)it, his Honor gave the plaintiff, the purchaser, his option to have his bill, which was for a specific performance according to the terms of the written agreement, dismissed, or to have the agreement performed in the way contended for by the seller(p).

(o) *Winch v. Winchester*, 1 Ves. & Beam. 375.

(p) *Ramsbottom v. Gosden*, 1 Ves. & Beam. 165. See *Flood v.*

‘where the construction is on the construction of words, *qua* words, no parol evidence can be admitted.’ 4 Dall. 340; 3 S. & R. 609.

(87) See *Gillespie v. Moon*, 2 Johns. Ch. Rep. 585. *Chapman v. Allen*, Kirby, 399. *Elmore v. Austin*, 2 Root, 415. *Washburn v. Merrills*, 1 Day, 139. *Malson v. Parkhurst*, 1 Root, 404. *Cook v. Preston*, 2 Root, 78. In *Christ v. Deffebach*, 1 Serg. & Rawle, 465, TILGHMAN, Ch. J. said, “It may be laid down as settled law, that parol evidence is admissible in cases of fraud and of plain mistake in drawing a writing.” In *South Carolina*, it has been decided that the scrivener who drew articles of a marriage settlement, could not be allowed to testify, that the object or intention of the deed, was different from that which appeared on its face. *Dupree v. McDonald*, 4 Des. 209. The same principle was recognized in *Rothmahler v. Myers*, 4 Des. 215.

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But in a case where a written agreement for a lease had been varied in part by parol, upon a bill filed by the tenant for a specific performance of the original agreement, the landlord set up a parol waiver of the written agreement, and a new agreement entered into at his solicitor's, every term of which was to the disadvantage of the plaintiff, without any consideration for the variation; the Master of the Rolls decreed a specific performance according to the prayer of the bill. His Honor considered the case made out *by the landlord(q) not a waiver of the contract*, but a variation by parol which had not been acted upon, and which was made without consideration. The first parol variation, it may be observed, was admitted, and the plaintiff would have been willing to execute it.

And in a case where an estate was sold in lots, and at the end of some of the lots only it was stated that the timber was to be taken at a valuation, but there was a general condition that the timber should be paid for; the seller's bill for a specific performance, requiring the purchaser of several lots to pay for all the timber, was dismissed, and parol evidence of the declaration of the auctioneer that the timber on all the lots was to be paid for, was rejected. The purchaser then filed a bill against the seller for a specific performance, according to his construction that he was to pay for the timber on the lots only to which (*) a stipulation to that effect was added. The seller, *as defendant*, offered parol evidence of the declaration by the auctioneer. The Vice-Chancellor agreed that fraud, mistake or surprise, would let in the evidence as a defence; but no authority having decided that evidence can be received, except upon one of those grounds, and these dec-

Finlay, 2 Ball & Beatty, 9; Lord William Gordon v. Marquis of Hertford, 2 Madd. 106; Garrard v. Girling, 1 Wils. Ch. Cas. 460; 1 Swanst. 244.

(q) Price v. Dyer, MS.; S. C. 17 Ves. jun. 356; Robinson v. Page, 3 Russ. 114.

larations in the case before his Honor being offered where the parties had contracted in writing upon a subject distinctly adverted to in their written contract, which made a provision for it (whether explicit and satisfactory is not material), the evidence of these declarations must be rejected, because there was no fraud, mistake, or surprise, and the evidence was offered to contradict, explain, or vary the written contract(r). It was not, however, necessary to decide the point ; and it may deserve reconsideration whether the evidence might not be deemed admissible in equity as a *defence*, simply on the ground that the plaintiff, who ought to come into equity with clean hands, sought to commit a fraud in evading to pay for the timber, although the auctioneer declared that it was to be paid for.

The case before Lord Eldon(s) shows the rule of equity in a strong light. The landlord filed a bill for a specific performance of the written agreement, varied by the parol evidence ; the tenant filed a cross-bill for a specific performance of the written agreement. The result was, that both bills were dismissed ; the first, because parol evidence was not admissible as a foundation for a decree *enforcing* a specific performance ; the second, on the ground that such evidence was admissible to rebut the equity of the plaintiff in the second bill.

A similar case appears to have been decided by Lord Chancellor Macclesfield. The case has, I believe, never (*)been cited, and it requires some attention to get at the facts. They appear, however, to be, that the plaintiff in the first bill sought a specific performance of an agreement by him to grant a lease to the defendant. The defendant set up a parol agreement, by which he was to have liberty to grub bushes, and exhibited a cross-bill

(r) *Clowes v. Higginson*, 1 Ves. & Bea. 524.

(s) *Lord Townshend v. Stangroom*.

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for a performance *in specie* of the written agreement, with the addition of a clause to grub bushes according to the parol agreement, and both the bills were dismissed, but without costs(*t*).

Upon the admissibility of parol evidence, as a defence to a bill seeking a specific performance, Lord Redesdale has forcibly observed, that it should be recollected what are the words of the statute: "No person shall be charged upon any contract or sale of lands, unless the agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." No person shall be charged with the execution of an agreement who has not, either by himself or his agent, signed a written agreement; but the statute does not say, that if a written agreement is signed, the same exception shall not hold to it that did before the statute. Now, before the statute, if a bill had been brought for specific performance, and it had appeared that the agreement had been prepared contrary to the intent of the defendant, he might have said, "That is not the agreement meant to have been signed." Such a case is left as it was by the statute: it does not say, that a written agreement shall bind, but that an unwritten agreement shall not bind(*u*). And nearly the same observations upon the negative words of the statute, were made by the Lord Chief Baron Skinner, in the great case of *Rann and Hughes*(*x*).

(*) But if parties enter into an agreement which is correctly reduced into writing, and at the same time add a term by parol, equity cannot look out of the agreement, although the person insisting upon the parol agreement

(*t*) *Hosier v. Read*, 9 Mod. 86. I have searched the Register's books for this case without success.

(*u*) 1 Scho. & Lef. Rep. 39.

(*x*) 7 Term Rep. 350, n.

is a defendant, and sets it up as a bar to the aid of the Court in favor of the plaintiff.

Thus, in *Omerod v. Hardman*(y), the vendor filed a bill for a specific performance. It was not mentioned in the written agreement at what time the purchaser was to take possession of the estate ; but the purchaser, the defendant, offered parol evidence to show that it was at the same time agreed, though not made part of the written agreement, that he should be let into possession at a stated time ; and he resisted a performance of the agreement, on the ground of possession not having been delivered to him according to the parol agreement. Mr. Justice Chambre objected to the evidence being read. He said, that it was urged for the defendant, that evidence may be read where the parol agreement is not inconsistent with the written agreement. This, (that is, the parol agreement, in the case before him,) he added, was to further the written agreement, and to secure what was through carelessness omitted to be provided for in the written agreement, viz. delivery of possession, according to the custom of the country. Mr. Baron Graham said, that the parol agreement could only be admitted where the written agreement was not drawn according to the intention of the parties at the time. You cannot by parol add any thing to what was the real agreement at the time, after that has been correctly reduced into writing. And he entirely agreed with Mr. Justice Chambre, that the parol could not be made to form part of the written agreement(88).

(y) 5 Ves. jun. 722.

(88) See *Thompson v. Ketcham*, 8 Johns Rep. 146. 2d edit. *Fitzhugh v. Runyon*, 8 Johns. Rep. 292. 2d edit. *Stackpole v. Arnold*, 11 Mass. Rep. 27. *Movan v. Hays*, 1 Johns. Ch. Rep. 339. *Stevens v. Cooper*, 1 Johns. Ch. Rep. 425. *Snyder v. Snyder*, 6 Binn. 483. *Streator v. Jones*, 1 Murphy, 449. *Smith v. Williams*, 1 Murphy, 426. S. C. 1 Car. Law Rep. 263. *Dickerson v. Dickerson*, 1 Car. Law

Lord Hardwicke is reported(z) to have said, that (*)a plaintiff seeking a specific performance might enter into parol evidence to show that the defendant was to pay the rent clear of taxes, no mention being made of taxes in the agreement ; because it was an agreement executory only, and as, in leases, there were always covenants relating to taxes, the Master would inquire what the agreement was as to taxes, and therefore the proof would not be a variation of the agreement. And this extra-judicial opinion appears to have been approved of by two enlightened Judges(a), one of whom(b) laid it down, that parol evidence was admissible to prove collateral matters, concerning which nothing was said in the agreement, as who was to put the house in repair, or the like.

But notwithstanding these *dicta*, it has been expressly decided, that parol evidence of even collateral matters, such as the payment of taxes, &c. which are of the essence of the agreement, is inadmissible both at law and

(z) 3 Atk. 389, 390 ; but see 4 Bro. C. C. 518 ; 6 Ves. jun. 335. n. 1 Scho. & Lef. Rep. 38.

(a) See 2 Blackst. 1250 ; 7 Ves. jun. 221.

(b) Mr. Justice Blackstone.

Rep. 262. *Sessions v. Barfield*, 2 Bay, 94. *Jackson v. Sill*, 11 Johns. Rep. 201.

In *Stackpole v. Arnold*, it was decided that want of consideration in a promissory note might be shown by parol. This seems *prima facie* repugnant to the general rule respecting written contracts ; but upon examination of the cases in which the evidence has been admitted it will appear that they all rest upon fraud, or upon a failure of the consideration, or upon some illegality in the transaction ; all of which may be proved without explaining or varying the terms of the contract. In *Bowers v. Hurd*, 10 Mass. 427, it is stated, that to a promissory note, in which value is acknowledged to have been received, it cannot be objected in deference, between the original parties, that there was in fact no consideration. But in subsequent cases, the same court have considered that opinion as untenable. *Hill v. Buckminster*, 5 Pick. 391 ; S. P. 6 ib. 427.

in equity. Thus, in *Rich v. Jackson*(c), it appeared that William Stiles and William Jackson entered into a treaty for the lease of a house belonging to Stiles, and in a conversation between them on the subject, Jackson offered 80*l.* a year rent, and that he would pay all the taxes, which Stiles agreed to accept. An agreement was drawn up by Jackson, in his own hand-writing, in which no notice was taken of taxes. Rich, who claimed under Stiles, refused to execute a lease unless the rent was made payable clear of taxes, and Jackson, the defendant, who claimed under William Jackson, refused to accept such a lease. Jackson having paid some money for land-tax, brought an action in the Court of Common Pleas for (*)the recovery of it, the plaintiff having refused to deduct it in the payment of the rent. The cause was tried at Guildhall, before Lord Rosslyn, then Lord Chief Justice of the Common Pleas. The defendant was suffered to give parol evidence of the real agreement, and his Lordship gave credit to the veracity of the witnesses, notwithstanding which he rejected the evidence, and directed a verdict to be given for Jackson, with costs; and, upon an application to the Court of Common Pleas, the Court approved of the verdict, and refused a rule to show cause why the same should not be set aside(89).

In this branch of the case, therefore, the point was

(c) 4 Bro. C. C. 514; 6 Ves. jun. 334, n.

(89) See *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. Rep. 273. S. C. on appeal, 14 Johns. Rep. 15. *Gilpins v. Consequa*, 1 Peters' Rep. 85, 87. *O'Hara v. Hall*, 4 Dall. 340. *Wolf v. Carothers*, 3 Serg. & Rawle, 240. *Wallace v. Baker*, 1 Binn. 610. And see *M'Kinney v. Leacock*, 1 Serg. & Rawle, 27. *Marshall v. Sprott*, Addis. 361. *Bruce v. Barber*, 3 Conn. Rep. 9. But the rule of law, that all previous negotiations are merged in the written contract, applies only to the parties to the deed. *Strong v. Glasgow*, 1 Cor. Law. Rep. 279. *Hawkins v. Hawkins*, Id. 496. See also, *Lewis v. Gray*, 1 Mass. Rep. 297.

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solemnly decided in a court of law, and the same determination was afterwards made upon the same case in a court of equity. Rich being defeated at law, filed his bill for a specific performance of the agreement, varied by the parol evidence; and the cause came on to be heard before Lord Rosslyn, then Lord Chancellor, who said, that the prior conversations, and the manner of drawing up the agreement by one party, and signing it by another, would have no influence. The real question was, whether in equity, any more than at law, the evidence ought to be admitted; whether there is any distinction in a court of equity, where a party comes to enforce a written agreement by obtaining a more formal instrument, and to add, in doing that, a term not expressed in the written agreement, and of such a nature as to bear against the written agreement. He had looked into all the cases, and could not find that the Court had ever taken upon itself, in executing a written agreement by a specific performance, to add to it by any circumstance that parol evidence could introduce. And he accordingly dismissed the bill, but without costs.

Indeed Lord Rosslyn appears to have made a similar (*)decision in a case prior to that of *Rich v. Jackson*. The case to which I allude is *Jordan v. Sawkins*(*d*); where a bill was filed for a specific performance of a lease, and it was stated, that there was a memorandum annexed to the original agreement, that the tenant(*I*) was to pay the land-tax (which, it must be presumed, was not signed, and was therefore only tantamount to a parol agreement). The cause was heard before the Lords Commissioners

(*d*) *Jordan v. Sawkins*, 3 Bro. C. C. 388; 1 Ves. jun. 402; and see *O'Connor v. Spaight*, 1 Scho. & Lef. 305; and see the cases *infra*, as to the discharge of a parol agreement.

(*I*) In the Report, the name of the landlord is, by mistake, printed for that of the tenant.

Eyre, Ashhurst, and Wilson, who decreed a performance of the contract with the variation, that it was to be at a clear rent of 40*l. without deducting land-tax*. The cause was re-heard before Lord Rosslyn, who said, that if the agreement had been carried into execution as it originally stood, the landlord must have paid the land-tax. The Court could not specifically perform an agreement with a variation, and he therefore reversed the decree, and dismissed the bill.

As a term agreed upon by parol cannot be added to a written agreement, by a parity of reason a written agreement cannot be *varied* by parol(90).

This was decided by Lord Thurlow in a branch of the last-mentioned case(e). It appeared that a lease was agreed, by writing, to be granted of a house for twenty-one years, to commence from the 21st of April 1791, and that it was afterwards agreed by parol, that the lease should commence on the 24th of June instead of the 21st of April. To a bill filed by the tenant for a specific performance of the written agreement, varied by the parol

(e) See 7 Ves. jun. 133.

(90) See *Stevens v. Cooper*, 1 Johns. Ch. Rep. 425. *M'Teer v. Sheppard*, 1 Bay, 461. *Dickerson v. Dickerson*, 1 Car. Law Rep. 262. See also, *Fleming v. Gilbert*, 3 Johns. Rep. 528. *Keating v. Price*, 1 Johns. Cas. 22. *Hasbrouck v. Tappen*, 15 Johns. Rep. 200. *Dwight v. Pomeroy*, 17 Mass. Rep. 303, 325.

An alteration or addition in a deed, without the consent of parties, will render it void ; but if an erasure be made, as by striking out an old obligor, and adding a new one, by consent of all parties, this does not, of itself, avoid the deed ; whether the alteration or erasure be made *prior* or *subsequent* to the execution of the deed ; and such consent may be proved by parol : And parol evidence will be let in to shew whether an erasure or interlineation on the face of a deed, has been made under such circumstances as the law will, or will not justify. *Speake v. United States*, 9 Cranch, 28, 37. LIVINGSTON, J., dissenting. Parol evidence not admissible to shew an erasure or alteration in the entry-book of the surveyor general. *Kerr v. Porter*, 1 Ten. Rep. 15.

agreement, the statute of frauds was pleaded, and Lord (*)Chancellor Thurlow held, that the different period of commencing the lease made a material variation, as it gave the estate from the owner for so many months longer, and therefore he allowed the plea.

The rule of the law is, *nihil tam conveniens est naturali æquitati, unumquodque dissolvi eo ligamine quo ligatum est* : and therefore, in general, as we have seen, an agreement in writing cannot be controlled by averment of the parties, as it would be dangerous to admit such nude averments against matter in writing(*f*). This was an imperative rule, previously to the statute of frauds ; and the statute required that “ all agreements upon any contract or sale of lands, &c. should be in writing.” Now, as Lord Hardwicke observed, an agreement to wave a purchase contract, is as much an agreement concerning lands as the original contract(*g*) ; notwithstanding which, it is universally considered, that an agreement in writing concerning land may be *discharged*, although it cannot be varied by parol(*h*). And in a late case, where all the authorities were mentioned, but in which it was not necessary to decide the point(*i*), the Master of the Rolls appeared to consider that a written agreement might be abandoned by parol(91).

(*f*) Countess of Rutland's case, 5 Co. 25 b ; *Blemerhasset v. Pierson*, 3 Lev. 234.

(*g*) 2 Eq. Ca. Abr. 33.

(*h*) 1 Ves. jun. 404 ; 4 Bro. C. C. 519 ; 6 Ves. jun. 337, n. ; 9 Ves. jun. 250 ; 3 Wooddes. 428, s. iv. ; Rob. on Stat. of Frauds, 89 ; and *Inge v. Lippingwell*, 2 Dick. 469 ; but see *Kaye v. Waghorn*, 1 Taunt. 428.

(*i*) *Price v. Dyer*, MS. Rolls ; S. C. 17 Ves. jun. 356, *post*.

(91) Where lands have been sold and conveyed, and the parties, afterwards, agree by parol, to rescind the contract, and the conveyances were given up in pursuance of such agreement, but by accident, the

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The first case on this head, is a short note in Vernon(*k*), where the precise point occurred, and the Lord Keeper held, that the agreement might be discharged by parol, (*)and therefore dismissed the bill, which was brought to have the agreement executed *in specie*. The next case is reported by Viner(*l*): *A.* leased a house to *B.* for eleven years, and was to allow 20*l.* to be laid out in repairs; the agreement was reduced into writing, and signed and sealed by both parties. *B.* repaired the house, and finding it to take a much greater sum than the 20*l.*, told *A.* of it, and that he would nevertheless go on and lay out more money if he would enlarge the term to twenty-one years, or add fourteen, or as many as *B.* should think fit. *A.* replied, that they would not fall out about that, and afterwards declared that he would enlarge the term, without mentioning the term in certain. The question was, whether this new agreement, made by parol, which varied from the written agreement, should be carried into execution, notwithstanding the statute of frauds. The Master of the Rolls said, that before the statute, a written agreement could not be controlled by a parol agreement, contrary to it, or altering it; *but this*

(*k*) Gorman v. Salisbury, 1 Vern. 240. I could not discover any trace of this cause in the Register's book.

(*l*) Anon. 5 Vin. 522, pl. 38; 4 Geo.

notes for the purchase money, were not given up; it was held, in an action on the notes, that parol evidence of the rescission of the contract, was not admissible, at law. *Sably v. Sandiford*, 2 Rep. Con. Ct. 445. The same principle was recognized in *Botsford and Morehouse*, 4 Conn. Rep. 550.

See *Stevens v. Cooper*, 1 Johns. Ch. Rep. 429, 430. The Chancellor, in giving his opinion in this case, remarking upon the principle that an agreement in writing concerning lands, may be discharged by parol, says, that "the evidence in such cases is good only as a defence to a bill for a specific performance; and is totally inadmissible, at law or equity, as a ground to compel a performance in specie." See also, *Botsford v. Burr*, 2 Johns. Ch. Rep. 405.

(*147)

was a new agreement, and the laying out the money was a part-performance on one part, and ought to be carried into execution ; and built his decree on these cases : first, where a parol agreement was for a building lease, and before it was reduced into writing, the lessee began to build, and after differing on the terms of the lease, the lessee brought a bill, and the lessor insisted on the statute of frauds ; the Lord Keeper dismissed the bill, but the plaintiff was relieved in *Dom. Proc.* : and the second was a case in Lord Jefferies's time.

Then came the case of Buckhouse and Crossby, before Lord Hardwicke^(m), where, to a bill filed by a purchaser for a specific performance, the vendor insisted the contract had been *discharged* by parol, and the case of (*)Goman v. Salisbury was cited by his counsel, as an authority in his favor. The Lord Chancellor, under the circumstances, decreed for the plaintiff, with costs ; and declared, that though he would not say that a contract in writing would not be waved by parol, yet he should expect, in such a case, very clear proof ; and the proof, in the present case, he thought very insufficient to discharge a contract in writing ; and observed, that the statute of frauds and perjuries requires that "all contracts and agreements concerning land should be in writing." Now, an agreement to wave a purchase contract is as much an agreement concerning lands as the original contract. However, he said, there was no occasion now to determine this point.

And, in another case, Lord Hardwicke is reported to have said, that it was certain that an interest in land *could not be parted with, or waved by naked parol, without writing* ; yet articles might, by parol, be so far waved, that if the party came into equity for a specific execution, such parol waver would rebut the equity which the party

(m) 2 Eq. Ca. Abr. 32, pl. 44 ; 10 Geo. II.

before had, and prevent the Court from executing them specifically⁽ⁿ⁾(92).

The case of *Legal v. Miller*^(o), comes next in point of time. The agreement was for taking a house at 32*l.* per annum, and part of the agreement was, that the owner should put the house in repair. It was afterwards discovered not to be worth while barely to repair the house, but better to pull it down; and, therefore, without any alteration in the written agreement, the house was pulled down by consent of the tenant, apprised of the great expense it would be to the landlord; and an agreement was made by parol only, on the part of the tenant, to add ^(*)8*l.* per annum to the 32*l.* The tenant brought a bill for specific performance, on the foot of the written agreement, by which he was to pay only the 32*l.* rent. The defendant, by his answer, set up the parol agreement. Sir John Strange said, such evidence is frequently suffered to be read, especially to rebut such an equity as now insisted on by the bill: as where the agreement is in part carried into execution, parol evidence is allowed to prove that; *or where it is a hard agreement; and the Court may, therefore, decree against the written agreement, as in 1 Vern. 240, (Goman v. Salisbury);* and the single question being here, whether the Court should decree a specific performance of the agreement the plaintiff insists upon, and being satisfied, from the parol evidence, that it should not, the Court must dismiss the bill. And in the subsequent case of *Pitcairne v. Ogbourne*^(p), Sir John Strange referred to this decision, and approved of it.

⁽ⁿ⁾ *Bell v. Howard*, 9 Mod. 302; and see *Earl of Anglesea v. Annesley*, 4 Bro. P. C. 421.

^(o) 2 Ves. 299.

^(p) 2 Ves. 375.

(92) See *Stevens v. Cooper*, 1 Johns. Ch. Rh. Rep. 430.
 (*149)

In the late case of *Price v. Dyer*(*q*), which has already been mentioned, where a parol waiver of a written agreement was set up as a defence to a specific performance, Sir William Grant was of opinion, 1st, that there was not an abandonment of the agreement, but merely a variation; and 2d, that as the variation was without consideration, and had not been acted upon, it was not a good defence to the plaintiff's demand. His Honor, after premising that the original written agreement was binding, and had not, in his opinion, been waved, added, that he inclined to think the effect of a clear abandonment by parol, would be to discharge the written agreement. But in the cases cited, the parol agreement put an end to the transaction, and restored the parties to their original situation. Here there was a mere variation. The (*)question then was as to the variation. Variations acted upon, as in *Legal v. Miller*, would be a bar; that is, a fraud. But his opinion was, that verbal variations were not a sufficient bar where the situation of the parties, in all other respects, remained unaltered. The defendant had lost nothing; would lose nothing. He had only lost what he had gratuitously gained. A specific performance of the original agreement was decreed, but without costs.

I have thought it of importance to bring all the cases which I have met with, on this point, fully before the reader, who will not fail to perceive, that in every case, except that in *Viner*, the party insisting upon the parol agreement, was not requiring the aid of the Court, but merely set up the agreement as a bar to a specific performance; and therefore, in strictness, these cases belong to the class before discussed, where the Court will admit the evidence to rebut the plaintiff's equity, although it would be inadmissible as a ground for relief. In the

(*q*) MS. Rolls; S. C. 17 Ves. jun. 356.

case in *Viner*, indeed, the person relying on the parol agreement was plaintiff; but the new agreement was in part performed by him, and the Master of the Rolls of that day expressly founded his decree on that ground. No case seems to go beyond that. In the case of *Price and Dyer*, the parol agreement was not, under the circumstances, held to be a sufficient *defence*.

Whether an absolute parol discharge of a written agreement, not followed by any other agreement upon which the parties have acted, can be set up even as a defence in equity, seems questionable. The result of the authorities as to a parol *variation*, appears to be,

1st, That evidence of it is totally inadmissible at law.

2dly, That in equity the most unequivocal proof of it will be expected.

3dly, That if it be proved to the satisfaction of the (*)Court, and be such a variation as the Court will act upon, yet it can only be used as a *defence* to a bill demanding a specific performance, and is inadmissible as a ground to *compel* a specific performance, unless,

4thly, There has been such a part-performance of the new parol agreement, as would enable the Court to grant its aid in the case of an original independent agreement, and then, in the view of equity, it is tantamount to a written agreement.

In considering the point under discussion, the reader will be careful not to confound the foregoing cases with the case of *Walker v. Constable*(r). There the *original* agreement was a *parol* agreement; and the question was, whether, being abandoned, parol evidence could be given of it. Lord C. J. Eyre held, that the existence and the terms of the agreement must be proved before it could be proved to be abandoned, and upon that it was sufficient

(r) 2 Esp. 659; 1 Bos. & Pull. 306. See *Adams v. Fairbairn*, 2 Stark. 277.

(*151)

to say, that *being in writing*(1) the instrument itself must be produced, and parol evidence of it was inadmissible.

II. The next branch of our subject, although the most trite, is not perhaps, therefore, less difficult. Lord Chancellor Bacon says(s), there are two sorts of ambiguities of words, the one is *ambiguitas patens*, and the other *latens*. *Patens*, he adds, is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seems certain, and without ambiguity, for any thing that appears upon the instrument, but there is some collateral matter out of the deed that breeds the ambiguity.

(*)A latent ambiguity may be assisted by parol evidence, because the ambiguity being raised by parol, may fairly be dissolved by the same means, according to the general rule of law(93). Therefore, if, previously to the statute, a man having two manors, both called Dale, had conveyed the manor of Dale to another, evidence might

(s) Max. p. 82; Reg. 23.

(1) That is, in contemplation of law, for it is not deemed an agreement unless reduced into writing.

(93) See *Stackpole v. Arnold*, 11 Mass. Rep. 27. *Cole v. Wendell*, 8 Johns. Rep. 90. 2d edit. *Allen's Les. v. Lyons*, MS. Rep. 1 Whart. Dig. 258. *Powell v. Biddle*, 2 Dall. 70. *Jackson v. Stanley*, 10 Johns. Rep. 133. See *Jackson v. Hart*, 12 Johns. Rep. 77. and *Jackson v. Goes*, 13 Johns. Rep. 518.; wherein the cases of *Jackson* and *Stanley* and *Jackson* and *Hart* are reviewed. See *Goddard v. Bulow*, 1 Nott & M'Cord, 45. *Elsworth v. Buckmyer*, 1 Nott & M'Cord, 431. *Middleton v. Perry*, 2 Bay, 539.

But parol evidence is not admissible to explain or contradict the plain and obvious meaning of words in a deed. *O'Harra v. Hall*, 4 Dall. 340. *Hamilton v. Cawood*, 3 Har. & M'Hen. 437. *Paine v. M'Intier*, 1 Mass. Rep. 69. See *Leland v. Stone*, 10 Mass. Rep. 459. *Hunt v. Adams*, 7 Mass. Rep. 519. *Ross v. Norvell*, 1 Wash. 14. See *Dimond's Les. v. Enock*, Addis. 356. *Eli v. Adams*, 19 Johns. Rep. 313.

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have been given to prove which manor was intended to pass(*t*), and such evidence is still admissible : this has been repeatedly decided(*u*). So, on the same principle, parol evidence is always received to show what is parcel or not of the thing conveyed(*x*)(94). And if an agreement refer to a plan as an existing document upon which the contract is founded, parol evidence is admissible for the purpose of identifying the plan(*y*).

In some cases a latent ambiguity may be fatal. Parol evidence may be adduced to prove the ambiguity, when none sufficiently satisfactory can be offered to explain

(*t*) 2 Ro. Abr. 676, pl. 11 ; and see Lord Cheney's case, 5 Rep. 68 ; Altham's case, 8 Rep. 155.a ; and *Harding v. Suffolk*, 1 Cha. Rep. 74.

(*u*) *Jones v. Newman*, 1 Blackst. 63 ; 3 Wils. 276 ; 2 Atk. 239, 240. 373 ; 1 Bro. C. C. 341.

(*x*) *Quaintrell v. Wright*, Bunb. 274 ; *Longchamps v. Fawcett*, Peake's Ca. 71 ; *Doe v. Burt*, 1 Term Rep. 701 ; Anon. 1 Str. 95 ; but where there is property to satisfy the words of the will, it cannot be shown by parol evidence that the testator meant to pass some not within the description. See *Doe v. Oxenden*, 3 Taunt. 147.

(*y*) *Hodges v. Horsfall*, 1 Russ. & Myl. 116.

(94) See *Hatch v. Hatch*, 2 Hayw. 32. *White v. Eagan*, 1 Bay, 247. *Middleton v. Perry*, 2 Bay, 539.

See *Coutts v. Craig*, 2 Hen. & Munf. 618. *Doolittle v. Blakeley*, 4 Day, 265. *Snyder v. Snyder*, 6 Binn. 483. In this case, it was held, that parol evidence was inadmissible to shew, that a part of the land granted, was excepted out of the grant.

Upon questions relating to the situation and boundary of lands conveyed, the decisions have been various ; in some of the states, the *English* common law rule has been adopted, and in others not. See *Loflen v. Heath*, 2 Hayw. 347. *Mageehan v. Adams' Les.* 2 Binn. 109. *Baker v. Seekright*, 1 Hen. & Munf. 177. *Francis v. Hazlerig*, 1 Marsh. Ken. Rep. 96. See *Lawless v. Jones*, Id. 17. *Helm v. Small*, Hardin, 369. *Middleton v. Perry*, 2 Bay, 539. *White v. Eagan*, 1 Bay, 247. As to conformity to the common law rule, see *Jackson v. Bowen*, 1 Caines' Rep. 358. *Hamilton v. Cawood*, 3 Har. & M'Hen. 437. *Milling v. Crankfield*, 1 M'Cord, 261.

it(z). And to render parol evidence admissible in these cases, a clear latent ambiguity must be first shown.—Evidence which merely raises a conjecture is insufficient(a).

But although a latent ambiguity may be aided by parol evidence, yet a patent ambiguity cannot be aided by extrinsic evidence, because that would in effect be to pass (*)without deed, what by the law can be passed by deed only. Of this Lord Chancellor Bacon observes, infinite cases might be put; for it holdeth generally, that all ambiguity of words, by the matter within the deed, and not out of the deed, shall be helped by construction(95), or in some cases by election, but never by averment, but rather shall make the deed void for uncertainty(96).

In *Mansell v. Price*, personal estate was settled in trust for Price the defendant, and Catherine his wife, for their lives, and the life of the survivor of them, and then for their issue, with a power to the wife to dispose of 1,500*l.*, part of the monies, to any persons she pleased. She exercised this power by giving the money to Sir Edward Mansell, in trust to pay 1,000*l.* to A., when she should attain twenty-one, or marry; but if she died before

(z) *Thomas v. Thomas*, 6 Term Rep. 671.

(a) See *Lord Walpole v. the Earl of Cholmondeley*, 7 Term Rep. 138.

(95) Patent ambiguities can be removed only by a sound construction of the words of the deed. *Storer v. Freeman*, 6 Mass. Rep. 435. *King v. King*, 7 Mass. Rep. 496. *Revere v. Leonard*, 1 Mass. Rep. 91. *Mumford v. Hallett*, 1 Johns. Rep. 433. *Mann v. Exrs. of Mann*, 1 Johns. Ch. Rep. 231. *Jackson v. Sill*, 11 Johns. Rep. 201. *M'Dermot v. U. S. Ins. Co.* 3 Serg. & Rawle, 607. *Duncan v. Duncan*, 2 Yeates, 302. *Benezet v. M'Clenachan*, cited in *M'Mina v. Owen*, 2 Dall. 173. *Little v. Henderson*, 2 Yeates, 295. *Stith v. Barnes*, 1 Car. Law Rep. 491. *Hamilton v. Cawood*, 3 Har. & M'Hen. 437. *O'Harra v. Hall*, 4 Dall. 340. *Harris v. Dinkins*, 4 Des. 60. *Dupree v. M'Donald*, 4 Des. 212.

(96) See *Rothmahler's Admx. v. Myers*, 4 Des. 215.

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twenty-one, or marriage, then it should be to such uses as *B.* should appoint. And the other 500*l.* she directed to be paid to *C.*, in exactly the same terms as before. The bill was filed by the guardian of *A.* and *C.*, infants, to have the money paid, and to be put out for them to have the interest thereof immediately. For the defendant Price, it was insisted that he was entitled to the interest of 1,500*l.*, until it should become payable. The first question was, whether parol evidence could be admitted to explain the intention of Catherine Price what should become of the interest till the times of payment; for if that could be admitted, there was sufficient to prove the husband should not have it. And the Master of the Rolls was of opinion that such evidence could not be read(*b*).

(*) So in *Kelly v. Powlet*(*c*), the question was, whether plate passed under a bequest of household furniture. The drawer of the will said, it was *not* intended; but his evidence was refused, and the plate was held to pass(97).

Again, in a case in the Exchequer(*d*), it appeared that, by an act of parliament, cast plate-glass was directed to be *squared* into plates of certain dimensions. The question was, whether certain plates were in the shape directed by the act. The Attorney-general at the trial produced books explaining the process and terms of art in the manufacture, and the defendants offered evidence to prove the

(*b*) MS. T. Term, 8 & 9 Geo. II.; and see *Hart v. Durand*, 8 Anstr. 684; *Chamberlaine v. Chamberlaine*, 2 Freem. 52; *Ulrich v. Ditchfield*, MS. 2 Atk. 372, where the evidence was not received.

(*c*) 1 Bro. C. C. 476, cited; Ambl. 605, reported, which I conceive has overruled *Pendleton v. Grant*, 1 Eq. Ca. Abr. 230, pl. 2; 2 Vern. 517; and see 1 Bro. C. C. 350, 351; *Seymour v. Rapier*, Bunb. 28; *Doe v. Bland*, 11 East, 441.

(*d*) *Attorney-general v. the Cast Plate-Glass Company*, 1 Anstr. 39.

(97) See *Mann v. Exrs. of Mann*, 1 Johns. Ch. Rep. 231. See also, 1 Yeates, 432. 1 Gallis. 173.

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technical meaning in the trade of the word *squaring* glass ; the evidence was, however, refused, and a verdict found against the defendants : and upon a motion for a new trial, Lord Chief Baron Eyre said : In explaining an act of parliament, it is impossible to contend that evidence should be admitted, for that would be to make it a question of fact, in place of a question of law(98). The judge is to direct the jury as to the point of law, and in doing so must form his judgment of the meaning of the Legislature, in the same manner as if it had come before him on demurrer, when no evidence would be admitted. Yet on a demurrer a judge may well inform himself from dictionaries or books, on the particular subject concerning the meaning of any word. If he does so at *nisi prius*, and shows them to the jury, they are not to be considered as evidence, but only as the grounds on which the judge has formed his opinion, as if he were to cite any authorities for the point of law he lays down.

(*) So parol evidence is inadmissible to restrain the legal operation of general words in an instrument. Therefore it cannot be admitted to prove, that a particular estate was not intended to pass under general words sufficient to comprise it(99).

(98) In the case of *M'Keen v. Delancy's* Les. 5 Cranch, 22, 32., the Supreme Court of the U. S. considered themselves bound to put the same construction upon the words of an act of assembly as had been uniformly given by the state courts ; but if the construction were to be given for the first time, they would have construed the statute differently. See *Sleght v. Hartshorn*, 2 Johns. Rep. 531. But whenever a question arises as to the construction of words, *qua* words, parol evidence cannot be admitted to explain them. *M'Dermot v. U. S. Ins. Co.* 3 Serg. & Rawle, 609. *Holmes v. Simons*, 3 Des. 149. Parol evidence cannot be admitted to contradict the common meaning or legal import of plain words in a will. *Shelton v. Shelton*, 1 Wash. 53.

(99) See *Slith v. Barnes*, 1 Car. Law Rep. 491. Nor can the meaning and operation of an instrument in writing, be extended, or enlarged beyond the plain and obvious import of the words used, so as to

Thus in *Davis v. Thomas*(*e*), a husband and wife being seized of settled estates in the county of Pembroke, bought an estate in the same county, called Rigman Hill, which was conveyed to them, and the survivor in fee. The husband having prevailed on the wife to join with him in suffering a recovery of the settled estates, in order to enable him to mortgage them, gave the attorney employed to suffer the recovery a particular description of the settled estates, which did not comprise Rigman Hill ; and it *clearly* appeared from several circumstances, that he had not any intention to comprise that estate, the title-deeds of which were in his wife's custody. The attorney, fearful of not comprising the whole estate, and not knowing that Rigman Hill had been purchased, added general words sufficient to comprise that estate. The recovery was suffered to the use of the husband in fee, who afterwards mortgaged the estate by the same description. The husband by his will gave all his estates to his wife for life. She survived him, and after her death the heir at law of the husband brought an ejectment against the persons claiming Rigman Hill, under the wife, which came on to be tried at the April Great Sessions for Pembrokeshire, in 1756. Parol evidence was offered by the defendant, to show that it was not intended to comprise Rigman Hill in the recovery and mortgage ; but it was refused, and the plaintiff had a verdict.

So in *Shelling v. Farmer*(*f*), where to a release in

(*e*) Reg. Lib. 1757, fol. 33, 34. See *Thomas v. Davis*, 1 Dick, 301, *et infra*.

(*f*) 1 Str. 646. See *Strode v. Lady Falkland*, 2 Vern. 621 ; 3 Cha. Rep. 90 ; and *Goodinge v. Goodinge*, 1 Ves. 231.

include other objects not expressed in the writing itself: Thus, where receipts were given by the heirs of an estate, to the administrator, for their shares of the estate, parol evidence cannot be admitted to shew, that it was the intention of the parties to release their interest in the real estate ; especially, where the money received was greatly inadequate to their shares. *Harris v. Dinkins*, 4 Des. 60.

(*)pursuance of an award, the plaintiff would have called the arbitrators to prove that they refused to take into consideration a particular fact, although the award and release contained *general words* sufficient to take in all. Eyre, C. J. would not suffer any evidence to be given to contradict the deed(100).

And in the recent case of *Butcher v. Butcher*(g) *general words* in a release were held not to extend to a certain bond of indemnity : and Lord Chief Justice Mansfield, at Guildhall, refused to admit parol evidence to show the intention of the releasor to release the bond(101). And upon a motion for a new trial, the Court of Common Pleas intimated a strong opinion, that no evidence could be admissible to explain the release, since the doubt, if any, was *ambiguitas patens*; and in consequence of this intimation the counsel for the plaintiff declined arguing the case.

But, as we shall presently see, the effect of general words may be restrained in a court of equity, on the ground of mistake, where it is satisfactorily proved.

It still remains to observe, that courts both of law and equity constantly advert to the situation of the parties, &c. in order to enable them to construe ambiguous or ill-penned instruments, although parol evidence of the intention of the parties could not be received, and this has been sanctioned by a leading case in the House of Lords(h)(102).

(g) 1 New Rep. 113.

(h) *Sir John Eden v. the Earl of Bute*, 7 Bro. P. C. 745. See *Countess of Shelburne v. the Earl of Inchiquin*, 1 Bro. C. C. 338.

(100) See *De Long v. Stanton*, 9 Johns. Rep. 38. *Munroe v. Alaire*, 2 Caines' Rep. 320. *Sessions v. Barfield*, 2 Bay, 94.

(101) See *Parsons v. Hooker*, 3 Johns. Rep. 68.

(102) See *Ambler v. Norton*, 4 Hen. & Munf. 23. *Kennon v. M^rRoberts*, 1 Wash. 102. *Shermer v. Shermer's Exrs.* 1 Wash. 272. *Dabney v. Green*, 4 Hen. & Munf. 101. *Gay v. Hunt*, 1 Murph. 141.
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In one case(*i*), where it was doubtful whether a covenant for renewal extended to a perpetual renewal, and the parties had renewed four times successively under the covenant, Lord Mansfield and the other Judges of the (*)King's Bench held, that the parties themselves had put a construction upon the covenant, and were therefore bound by it. Lord Alvanley, who was in the cause, said, when Master of the Rolls, that he was never more amazed than at this decision, and that Mr. Justice Wilson, who argued with him, was astonished at it(*j*); and his Lordship more than once expressed his marked disapprobation of this doctrine(*k*). Lord Eldon(*l*), and Sir Wm. Grant(*m*), have both also dissented from it; and Lord C. J. Mansfield, in a late case, observed, that it was a case which had been impeached upon all occasions(*n*). And it appears to be now clearly settled, that in the *construction* of an agreement or deed, the acts of the parties cannot be taken into consideration(*o*)(103).

Where, however, the words of an *ancient* statute or instrument are doubtful, *contemporaneous* usage, although it

(*i*) Cook v. Booth, Cowp. 819; and see Blackst. 1249; 1 New Rep. 42. See Peake on Evid. ch. 2.

(*j*) Baynham v. Guy's Hospital, 3 Ves. 295; and see 2 Ves. jun. 448.

(*k*) See Eaton v. Lyon, 3 Ves. jun. 690.

(*l*) See Iggulden v. May, 9 Ves. jun. 325.

(*m*) See Moore v. Foley, 6 Ves. jun. 232.

(*n*) See 2 New Rep. 452.

(*o*) See Clifton v. Walmsley, 5 Term Rep. 564; and see Iggulden v. May, 7 East, 237.

Powell v. Biddle, 2 Dall. 72. Possession of land may be resorted to, in order to explain the intention of parties, where the words of the deed are equivocal. *Livingston v. Ten Broeck*, 16 Johns. Rep. 14. Per SPENCER, J.

(103) See *Souwerbye v. Arden*, 1 Johns. Ch. Rep. 240. *Revere v. Leonard*, 1 Mass. Rep. 93; and see *Cortelyou v. Van Brundt*, 2 Johns. Rep. 357.

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cannot overturn the clear words of the instrument, will be admitted to explain it(104); for *jus et norma loquendi* is governed by usage, and the meaning of things spoken or written must be as it hath constantly been received to be by common acceptation(*p*). This has been determined in many cases, and such evidence accordingly received(*q*). And in a late case on this subject, Lord Ellenborough (*)said, it was in constant practice at *nisi prius* to receive evidence of usage to explain doubtful words in old instruments; and it would be difficult to show any just ground of distinction between the information which a Judge might receive to aid his judgment in bank and at *nisi prius*(*r*).

III. The last division of our subject relates to the jurisdiction of equity, in correcting mistakes and fraudulent omissions in agreements and deeds(I)(105).

(*p*) Sheppard v. Gosnold, Vaugh. 169.

(*q*) Rex v. Varlo, Cowp. 246; Gape v. Handley, 3 Term Rep. 228, n.; Blankley v. Winstanley, 3 Term Rep. 279; Rex v. Bellringer, 4 Term Rep. 810; Rex v. Miller, 6 Term Rep. 268; and see Attorney-general v. Parker, 2 Atk. 576; Attorney-general v. Forster, 10 Ves. jun. 335; Kitchen v. Barch, 7 East, 53; Bailiffs, &c. of Tewkesbury v. Bricknell, 2 Taunt. 120.

(*r*) Rex v. Osbourne, 4 East, 327; and see Stammers v. Dixon, 7 East, 200.

(I) Even at law the palpable mistake of a word will not defeat the intention of the parties. In a case in the Common Pleas, where the condition of a bond was, that it should be void if the obligor did *not* pay; and performance being pleaded on the ground of literal expression,

(104) See *Livingston v. Ten Broeck*, 16 Johns. Rep. 14. Evidence of usage is not admissible to explain the language of a deed not ambiguous or equivocal. *Cortelyou v. Van Brundt*, 2 Johns. Rep. 357.

(105) It is well settled, that courts of equity will relieve against mistakes in agreements. *Wiser v. Blackley*, 1 Johns. Ch. Rep. 607. *Gillespie v. Moon*, 2 Johns. Ch. Rep. 585. *Keisselbrack v. Livingston*, 4 Johns. Ch. Rep. 144. *Barndollar v. Tate*, 1 Serg. & Rawle, 160.

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In *Henkle v. the Royal Exchange Assurance Office(s)*, Lord Hardwicke said, that no doubt but equity had jurisdiction to relieve in respect of a plain mistake in contracts in writing, as well as against frauds in contracts; so that if reduced into writing contrary to the intention of the parties, on proper proof that would be rectified; he thought, however, that in these cases there should be the strongest proof possible. In a case which was much agitated before Lord Thurlow, he laid down the rule with great latitude, that if a mistake appears, it is as much to be rectified as fraud(*t*). So in another case before the (*)same Chancellor, he said that he thought it impossible to refuse, as incompetent, evidence which went to prove that the words taken down were contrary to the concurrent intention of all parties. To be sure, he added, it

(*s*) 1 Ves. 317.

(*t*) *Taylor v. Radd*, 5 Ves. jun. 595, cited.

the Court held the plea bad. *Anon. Dougl.* 384, cited, 2d edition. See 1 Dow, 147. It seems clearly settled, that words evidently omitted in a will by mistake may be supplied, both at law and in equity, *Tollett v. Tollett*, Ambl. 194; *Coryton v. Hellier*, 2 Bur. 923, cited; and *Doe v. Micklem*, 6 East, 486; see *Lane v. Goudge*, 9 Ves. jun. 225; *Mellish v. Mellish*, and *Phillips v. Chamberlain*, 4 Ves. jun. 45, 51; but however evident the mistake may be, the words will not be supplied if the testator's manifest intention would be defeated by the insertion of them. *Chapman v. Brown*, 3 Burr. 1626. See 2 Ves. jun. 365.

Smith v. Williams, 1 Murph. 426. *Middleton v. Perry*, 2 Bay, 539. *White v. Eagan*, 1 Bay, 247. *Geer v. Winds*, 4 Des. 85. *Washburn v. Merrills*, 1 Day, 139. *Peters v. Goodrich*, 2 Conn. Rep. 146. *Mead v. Johnson*, 2 Conn. Rep. 592. *Argenbright v. Campbell*, 3 Hen. & Munf. 144. In this case, a mistake in one writing was corrected by another, to which it referred. In *Christ v. Diffebach*, 1 Serg. & Rawle, 465., TILGHMAN, Ch. J. said, "It may be laid down as settled law, that parol evidence is admissible in cases of fraud and of plain mistake in drawing a writing."

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must be strong, irrefragable evidence, but he did not think he could reject it as incompetent(*u*)(106).

Lord Eldon, observing upon these *dicta*, said, that Lord Thurlow seemed to say that the proof must satisfy the Court what was the concurrent intention of all parties; and his Lordship added, *it must never be forgot to what extent the defendant, one of the parties, admits or denies the agreement*(107). In the case before Lord Eldon(*x*), a specific performance of an agreement was sought, with a variation attempted to be introduced by parol, on the ground of mistake and surprise, which was positively denied by the defendant. And his Lordship said, that he would not say, that upon the evidence without the answer, he should not have had so much doubt whether he ought not to rectify the agreement, as to take more time to consider whether the bill should be dismissed; but as the agreement was to be considered with reference to the answer by which he had positively denied it, his Lordship dismissed the bill, but without costs(108).

(*u*) *Countess of Shelburne v. the Earl of Inchiquin*, 1 Bro. C. C. 338; and see *Cock v. Richards*, 10 Ves. jun. 441.

(*x*) *Marquis of Townshend v. Stangroom*, 6 Ves. jun. 328.

(106) See *Gillespie v. Moon*, *ut supra*. *Lyman v. United Ins. Co.* 2 Johns. Ch. Rep. 630. *Souerby v. Arden*, 1 Johns. Ch. Rep. 240, 252. *Getman's Exrs. v. Beardsley*, 2 Johns. Ch. Rep. 274. *Dupree v. M^r Donald*, 4 Des. 210, 211.

(107) In *Gillespie and Moon*, *ut supra*, it was held, that parol evidence was admissible to shew a mistake, although it be denied in the answer; and such evidence is to be received, as well, where the plaintiff seeks relief on the ground of the mistake, as where the defendant sets it up as a defence. As to the efficiency of an answer denying an allegation in the bill, and the evidence necessary to outweigh the answer, see *Zilstra v. Keith*, 2 Des. 140. See also, *Lyman v. United Ins. Co.* *ut supra*, and *Gillespie v. Moon*, 2 Johns. Ch. Rep. 593. *Pringle v. Samuel*, 1 Litt. 43.

(108) See *Lyman v. United Ins. Co.* 2 Johns. Ch. Rep. 630.

In *Gillespie v. Moon*, 2 J. Ch. R. 585, where the bill was brought

Lord Eldon's decision precisely accords with Lord Thurlow's opinion, which he rightly construed. For in

to rectify a mistake, in the conveyance to the defendant, which, by an error in the description of the land, conveyed the whole lot, or 250 acres, instead of 200 acres parcel of the same. The mistake was denied in the answer; and it was objected that parol evidence of the mistake was not admissible, in order to explain the language of the deed, and, especially in opposition to the answer of the defendant. The Chancellor, however, admitted the evidence. "The cases, he remarked, concur in the strictness and difficulty of the proof, but still they all admit it to be competent, and the only question is, does it satisfy the minds of the Court? Lord Hardwicke said, it must be proper proof, and the strongest proof possible; and Lord Thurlow, that it must be strong, irrefragable proof; and, he said, the difficulty of the proof was so great, that there was no instance of its prevailing against a party insisting that there is no mistake. We are now considering the question of the competency, and not of the amount of the parol proof, and it appears to be the steady language of the English Chancery, for the last 70 years, and of all the compilers of the doctrines of that court, that a party may be admitted to show, a *mistake*, as well as fraud, in the execution of a deed or other writing.

Application of the principle. On bills for a specific performance of an agreement in writing, the defendant has frequently been admitted to show, by parol proof, a mistake in such agreement, and, by that means, to destroy the equity of the bill. The relief on such bills is said to rest in discretion, and if the defendant can show surprise or mistake, it makes the special performance of such an agreement unjust. There is another class of cases in which the object of the parol proof is to correct mistakes in bonds, deeds of settlements, mortgages, and, generally, in all contracts and agreements, and where the proof is introduced to aid the plaintiff in his bill, as well as to aid the defendant in his defence.

Whether such proof be admissible on the part of a plaintiff who seeks specific performance of an agreement in writing, and at the same time seeks to vary it by parol proof, has been made a question. Lord Hardwicke in *Jones v. Statham*, 3 Atk. 388, seemed to think it might be done; but such proof was rejected by the master of the Rolls in *Wollam v. Hearn*, 7 Ves. 211. and again in *Higginson v. Clowes*, 15 Ib. 516; and Lord Redesdale said, in *Clinan v. Cooke*, 1 Scho. & Lef. 39, that he could find no decision in which a plaintiff had been permitted to show an omission in a written agreement, by mistake or fraud, he must be understood to refer to cases of bills for a specific performance of an agreement, which was the case then before him. There are numerous

Lord Irnham *v.* Child(y), it was observed by Lord Thurlow, that if a mistake be admitted, the Court would not

(y) 1 Bro. C. C. 92 ; and see Hare *v.* Shearwood, 3 Bro. C. C. 168 ; 1 Ves. jun. 241 ; and Haynes *v.* Hare, 1 Hen. Blackst. 659.

instances in which *the plaintiff* has claimed and obtained relief, by showing a mistake in the agreement ; and there would be a most deplorable failure of justice, if the mistakes could only be shown and corrected when set up by a defendant to rebut an equity. The cases of Randal *v.* Randal, 2 P.Wms. 464 ; Rogers *v.* Earl, Dickens, 294, and of Barstow *v.* Kilvington, 5 Ves. 593, were bills filed to rectify mistakes in settlements ; and in all of them proof *aliunde* was admitted, though the admission was resisted ; and, in two of the cases by the defendant, who claimed as heir against the mistake.

It has been said, that there was no instance of a mistake, corrected in favor of a plaintiff, against the answer of the defendant, denying the fact of mistake. But I do not understand any of the *dicta* on this point to mean, that the answer, denying the mistake, shuts out the parol proof, and renders relief unattainable, however strong that proof may be. The observations of Lord Eldon in *The Marquis of Townsend v. Stangroom*, certainly imply no more, than that the answer is entitled to weight, in opposition to the parol proof ; but it certainly can be overcome by such proof. In that very case, the answer denied the mistake, yet parol proof was held admissible. Lord Thurlow said, that there was so much difficulty in establishing the mistake, to the entire satisfaction of the court, that it had never prevailed against the answer denying the mistake. But, as I read the case of *Pitcairn v. Ogbourne*, 2 Ves. 375, before Sir John Strange, the bill was to be relieved against an annuity bond, and to reduce the sum according to the original understanding and agreement of the parties. Parol proof was admitted ; and relief was not granted upon other and distinct grounds, no way connected with the question, as to the competency and effect of the proof.

It is the settled law of this court, as was shown in the case of *Boyd v. M'Lean*, 1 J. Ch. R. 582, that a resulting trust may be established by parol proof, in opposition to the deed, and in opposition to the answer denying the trust. There is no reason why the answer should have greater effect in this than in that case, and there would be manifest inconsistency in the doctrines of the court, if such a distinction existed. The case of *Marks v. Pell*, 1 ib. 598, 9, admitted, that parol proof of mistakes was competent ; and it was held not to be sufficient, in that case, because it consisted of naked confessions of a party, made seventeen years after peaceable possession, under a deed. The confessions

overturn the rule of equity by varying the deed ; but it would be an equity *dehors* the deed. Then it should be

also, in that case, were of a negative kind, and deduced from tacit acquiescence ; the party who made them was dead, and the possession had been, for 30 years, under the deed, and there were no corroborating circumstances in aid of the confessions.

Washburn v. Merrills, 1 Day's Cas. in Error, 139, is a strong case on the subject. A mortgagor by mistake, made an absolute deed ; and the mortgagee got into possession, sold to a purchaser, by a deed with covenants of warranty. A purchaser under the mortgagor filed his bill, against the purchaser, under the mortgagee to redeem. The answer set up the statute of frauds as a defence ; and on the trial, parol proof of the mistake was offered by the plaintiff and admitted, and the deed established, and a right of redemption decreed. This decree was unanimously confirmed in the Court of Errors.

In the case of *Comstock v. Hadlyme*, 8 Conn. 854, where the question arose whether the declarations of the deviser, made about the time of executing her will, tending to shew that she was unduly influenced, were admissible in evidence on a trial of the probate of the will : held, that they were only admissible for the purpose of showing the state of mind of the deviser. Williams, J. " If it was claimed, that those declarations were part of the *res gesta*, the time when made should have been precisely stated ; *about the time* is quite too indefinite : and if her declarations were not a part of the *res gesta*, I know not upon what principle they can be introduced as evidence of *facts*. Is a will or deed, valid upon the face of it, to be destroyed, or in any way affected, by the declarations of the deviser or grantor ? Some strong authority is necessary to support such a proposition. In the case of a deed, it would not be claimed. A will, to be sure, is ambulatory ; and nothing vests, during the life of the deviser. Still, however, it can be altered or revoked only in a legal manner. In *Nelson v. Oldfield*, 2 Vern. 76. evidence of what the testator said, to prove duress, was admitted ; but no objection appears to have been made, and the Court said, the legatee had her probate, and might make what use she could of it, but a Court of Chancery would not aid her. In *Jackson v. Kniffen*, 2 Johns. R. 31. the Ch. says : " To permit wills to be defeated by the parol declarations of the testator, appears to me repugnant to the very genius and spirit of the statute, and not to be allowed." And in *Smith v. Fenner*, 1 Gall. 172. it was held, that the declarations before and at the execution of the will, were admissible, but none made after, unless so near the time of the execution as to be a part of the *res gesta*, or necessarily connected with it. And in *Stevens v. Vancleve*, 4 Wash. C. C. R.

proved as much to the satisfaction of the Court, as if it were (*)admitted : “ *The difficulty of this is so great,*

265. Washington, J. says, “ The declarations of a party to a deed or will, whether previous or subsequent to its execution, are nothing more than hearsay evidence ; and nothing could be more dangerous than the admission of it, to control the construction of the instrument, or to support or destroy its validity.”

In *Comstock v. Haldyme*, the question was presented whether a mistake in drafting a will, will render it void. The mistake consisted in omitting to insert in the will according to the direction of the testatrix a legacy to her grandchildren. The court held that the evidence was not admissible. Williams, J. observed “ The statute, when it required all wills to be in writing, signed by the testator and attested by witnesses, certainly intended, that the evidence, and the whole evidence, of the disposition of property by will, should be the will itself ; that the evidence of the intent of the devisor should be derived from the writing, signed by him and solemnly attested ; otherwise, innumerable would be the cases, where evidence of mistake would be claimed and proved.

It has always been decided, that parol testimony could not be admitted to prove, that the devisor intended to give a different estate from what the will expressed. *Chappel v. Avery*, 6 Conn. 34 ; *Farrer v. Ayres*, 5 Pick. 407. It is a sacred rule of property not to be departed from. *Goodtitle v. Edmonds*, 7 Term 635, 640. *Richards v. Dutch*, 8 Mass. 506, 515. And if it is settled, that you cannot, by parol proof, alter the legal import of the terms used by the scrivener, such a will must either be void, or convey a different estate from the one intended. It is not void. Doug. 763 ; 1 B. & B. 261. n. Cowp. 660.

In contracts, mistakes have, indeed, been *rectified*, in a court of Chancery, but no case is recollected, where they have been holden void, on account of a mistake. In *Phillips v. Chamberlaine*, 4 Ves. jun. 51, 57. where an intention was expressed to give a legacy to the Humane Society, but no sum was inserted, the will was held not to be void. And it would seem, that in this case, if any remedy existed, it would be one that would not destroy the whole will, but one which would correct the mistake, and make it what it ought to be. That has been attempted, in a recent case ; and it was decided, that parol testimony could not be admitted to prove the mistake. It would be to make a will by witnesses, and not by writing ; to make a will any thing. *Avery v. Chappel*, 6 Conn. 270, 275. And if such evidence cannot be admitted, in Chancery, to prove a mistake in a will, where is the principle, or where the authority, that such evidence can be admitted to render the will void ? Courts of law and chancery proceed upon the same principle as to ad-

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that there is no instance of its prevailing against a party insisting there was no mistake."

mitting parol testimony ; and it is certainly a novel idea, that courts of chancery are less liberal, on that subject, than courts of law. I think, then, it follows, that if courts of chancery cannot admit such evidence to prove a mistake, which they might correct, courts of law cannot admit it to prove a mistake to set aside the will. The danger arising from the admission of the proof is the same in both cases ; and if the rules of law would allow that proof, it would be congenial to principle, and more likely to effectuate the intent of the devisor, to correct the mistake, than to make void the whole instrument. And if the former cannot be done, much less can the latter. And the fact that no case is found since the statute 29 Car. 11. is strong, if not conclusive evidence, that such has been the construction.

In *Reading v. Weston*, 8 Conn. 117, it was decided that parol evidence was not admissible to prove an absolute deed to be a deed on condition. *Flint v. Sheldon*, 13 Mass. 443. decided, that an absolute deed of land cannot be varied, by parol evidence, shewing that it was for the loan and repayment of a sum of money. But it has often been decided in Chancery, that parol evidence is admissible to shew, that an absolute deed was intended as a mortgage, and that a defeasance was omitted through fraud or mistake. Hence, a deed absolute on the face of it, and though registered as a deed, will in Chancery be held valid and effectual as a mortgage, as between the parties, if it was intended by them to be merely a security for a debt, although the defeasance was by an agreement resting in parol. *Washburn v. Merrills*, 1 Day 139 ; *Strong and al v. Stewart*, 4 J. Ch. R. 417 ; *Marks & al v. Pell*, 1 ib. 594 ; *Clark v. Henry*, 2 Cowen, 323 ; *Slee v. Manhattan Co.* 60, 1 Paige 48. Chancery interposes, because a court of law does not afford a remedy. The rule in the courts of law, is, that the written instrument, contains the true agreement of the parties, and that the writing furnishes better evidence of their intention than any that can be supplied by parol. But in equity, relief may be had against any deed or contract founded in mistake or fraud. See cases *supra*.

Though it is the province of a Court of Chancery to relieve against fraud, accident and mistake, it must be a mistake in fact and not a mistake in law. Thus, in *Wheaton v. Wheaton*, 9 Conn. 96. which was a bill in chancery, which alleged that the writings were drawn without the scrivener's being informed what the agreement between the parties was. Nor did the plaintiff pretend, "that the note was executed by him under mistake in any one matter of fact. It is simply, that the plaintiff ignorantly supposed a note, payable, by the terms of it, in

Where the Court cannot satisfy itself of the fact, an issue may be directed to try the question. Thus, in the case of the *South Sea Company v. D'Oloff*(z), D'Oloff agreed not to carry goods under certain circumstances; and if information was given in two months after return home that he had done so, he was to pay certain stated damages. The instrument was not drawn up until on board the ship, and in a great hurry, and executed there by D'Oloff; who when he got out to sea, and read it over, found it was six months instead of two; and brought a bill to be relieved against that variation in the instrument, the company having brought an action on it. Lord King sent it to an issue; it was tried on a question, whether it was the original agreement it should be two instead of six months. A verdict was given in favor of the plaintiff, that the agreement was designed to be in two, and in consequence of that, Lord Talbot made a decree to relieve the plaintiff against any difficulty by the variation.

(z) 2 Ves. 377; 5 Ves. jun. 601, cited; and see *Pember v. Mathers*, 1 Bro. C. C. 52.

three years, to be, *in law*, a note payable at the death of the obligee; and then not actually to be paid, but to be delivered up: And to show this mistake, said Bissel, J. we are asked to let in parol evidence. The court held clearly, that the evidence was not admissible. After citing *Hunt v. Rousmanier*, 8 Wheat. 174, and 1 Pet. U. S. R. 1, the learned Justice remarked, "It would not, perhaps, be going too far to say, that the doctrines laid down by Chief J. Marshall, in this case, were greatly shaken, by the subsequent opinion of Judge Washington; and that taking the whole case together, it will hardly warrant a departure from principles long considered as settled."

The parol declarations of the testator as to the estate he intended to give by the will are not admissible; for they cannot control what the law considers settled upon the face of the will. *Farrar v. Ayres*, 5 Pick. 404. However, when there is an ambiguity in the words used, which will justify an explanation by extrinsic matter, the Court will permit a resort to memoranda written and signed by the testator, to show what was intended to be included by the words in the will. *Wadsworth v. Ruggles*, 6 Pick. 63.

The hesitation with which parol evidence is received in equity to correct even mistakes in agreements and deeds, is strongly exemplified by a case before Sir William Fortescue(*a*)(109). Previously to marriage an estate was agreed to be settled on the intended husband for life, remainder to the wife for life, remainder to the sons successively in tail male, remainder to all the daughters. Instructions were given to an attorney to draw the settlement, who drew it as far as the limitations to the sons, where he (*)stopped, and said, then go on as in *Pippin v. Ekins*; which was a precedent he delivered to his clerk, to go on from that limitation, and was a right settlement to the issue male and daughters by that wife; but the clerk drew the settlement to all the daughters of the husband, without restraining it to that marriage: it was executed with this mistake: the question arose between an only daughter of that marriage and children of the husband's by the second wife. The draft of the attorney was proved, and the settlement in *Pippin v. Ekins*; but the Court would not admit parol evidence of the attorney to be read, and held that the other evidence would not do; that nothing appearing in writing under the hands of the parties, the settlement could not be altered. And Sir Thomas Clark is reported to have said(*b*), that as to the head of the mistake, he did not give a positive opinion, but he did not think the Court had relied upon parol evidence singly.

But whatever difficulty there may be of admitting parol evidence singly, yet it is always admitted where it is corroborated by other evidence.

This doctrine was carried a great way in the case of *Dr. Coldcot v. Serjeant Hide*(*c*). *Dr. Coldcot* having

(*a*) *Harwood v. Wallis*, 2 Ves. 195, cited.

(*b*) 1 Dick. 295.

(*c*) 1 Cha. Ca. 15; 2 Freem. 173; 1 Sid. 238, cited; 14 Car. II.

(109) See *Dupree v. M'Donald*, 4 Des. 211.

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purchased church-lands in fee, under the title of Cromwell, sold them to the defendant's testator, and entered into general covenants for the title. Upon the Restoration the estate was avoided, and upon an action on the covenants, damages to the value of the purchase-money were recovered. A bill was then filed to be relieved against the recovery at law, which suggested a surprise upon the plaintiff, in getting him to enter into general covenants, and that it was declared by the parties, when the deed was executed, that it was intended Dr. Coldcot should not undertake any further than against himself; and *there* (*) *being some proof of this declaration*, it was decreed by the Lord Chancellor and Master of the Rolls, that the defendant should acknowledge satisfaction on the judgment, *and pay costs*. And the reporter says, a like case to this between Farrer v. Farrer was heard and decreed after the same manner, about six months ago.

A case, nearly similar, occurred about eleven years afterwards(*d*); but it appeared that all the covenants except the one upon which judgment had been obtained at law, were restrained to the acts of the vendor, *and that the vendor sold only such estate as he had*.

This last case was quoted in a case in the Common Pleas before Lord Eldon(*e*), who thought the decision must have been made on the ground of the intent of the parties appearing on the instrument, since that intent, and the consequent legal effect of the instrument, could only be collected from the instrument itself, and not from any thing *dehors*. In a still later case in the same Court(*f*), Lord Alvanley thought, under the circumstances of the case, that the application was made to the Court of Chancery to correct the mistake, in the same manner as applica-

(*d*) Fielder v. Studley, Finch, 90.

(*e*) Browning v. Wright, 2 Bos. & Pull. 26.

(*f*) Hesse v. Stevenson, 3 Bos. & Pull. 575.

tions are made to that Court to correct marriage articles where clauses are inserted contrary to the intent of the parties. It seems clear, however, that the relief in this case was founded on parol evidence *that the vendor sold only such estate as he had*, corroborated as it was by the form of the deed and the subject of the contract. Such evidence was received in the prior case of Dr. Coldcot and Serjeant Hide, and is still clearly admissible.

Thus in *Young v. Young*(*g*), the plaintiff married Lucy, a defendant, and an infant; the husband stated, or (*)drew by way of instructions to his attorney, what the wife's fortune then was, and agreed to add as much to be settled in strict settlement, and likewise stated that the intended wife had a prospect of an additional fortune; to which he agreed, provided it did not exceed 1,000*l.*, to add a like sum, to be likewise settled strictly, and he to have the excess. The settlement was prepared according to the instructions; but the solicitor having, in the margin of the draft, added double the sum, the settlement was prepared and executed according to that mistake. Parol evidence was admitted to prove the mistake; that is, the settlement was first shown to differ from the written instructions, and parol evidence of the counsel and attorney was then received, to prove the mistake.

This equity was administered in the case of *Thomas v. Davis*, before cited(*h*), where it clearly appeared, that the estate in question was not intended to be comprehended in the general words. This appeared from many circumstances, but particularly from the description of the estate given by the husband to the attorney by way of instructions, which described the lands particularly, and did not include Rigman Hill; and the attorney proved that he did not know of this estate, and that he introduced gener-

(*g*) 1 Dick. 295, cited. See 1 Dick. 303, 304.

(*h*) *Supra*, p. 155; 1 Dick. 301; Reg. Lib. B. 1757, fol. 33, 34.

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al words, merely to guard against any wrong or imperfect description of the lands actually intended to pass. It was objected, that the admission of the attorney's evidence was in direct contradiction to the statute of frauds; but Sir Thomas Clark was clear it might be read, and accordingly admitted it(I).

(*)So in *Rogers v. Earl(i)*, instructions were given, previously to marriage, for a settlement of the wife's estate on the husband during his life, if he and his wife should so long live, remainder to the wife for life, remainder to the issue of the marriage in strict settlement, remainder to such uses as the wife should appoint; and a draft of a settlement was drawn accordingly. And after the limitation to the husband, it stood thus: And immediately after the decease of the husband, then to the wife, &c.; and proper limitations were inserted to trustees to preserve contingent remainders. When the wife saw the draft, thinking she was past child-bearing, she objected to the limitations to the issue, and they were directed to be struck out. The attorney, by mistake, not only struck out those limitations, but also the limitation to the wife for life, and the subsequent limitation to trustees to pre-

(i) 1 Dick. 294. Note, the facts are not stated in the report; they are extracted from the Registrar's book; see Reg. Lib. B. 1756, fol. 205; see *Pritchard v. Quinchant*, Ambl. 147; 5 Ves. jun. 596, n. (a); and *Barstow v. Kilvington*, 5 Ves. jun. 593; and see *Nelson v. Nelson*, Nels. Cha. Rep. 7; *Shaw v. Jakeman*, 4 East, 201.

(I) The judgment is very inaccurately stated in the report. After addressing himself to the general words, the Master of the Rolls is stated to have said, Do these words comprise Redmond [Rigman] Hill? I do not think they do include Redmond Hill; but other words do. If Redmond Hill was not intended, why was the wife to join; and why did she join?—This is absolute nonsense. The wife joined because she was interested in the settled estates; and the opinion of the Court was, that the general words did include Rigman Hill. The editor's marginal abstract of this case shows how difficult it is to understand the report of it.

serve, and the deed was executed without the mistake being discovered, whereby, as the bill stated, the said power for appointing the reversion of the premises was made to take place on the decease of the plaintiff generally, though the limitation to him was only during the joint lives. The wife exercised her power by deed in favor of her husband during his life, and then by will gave him the fee, and then died in his life-time. Her heir-at-law insisted that the use resulted to him during the husband's life, and that there being no trustee to preserve (*)contingent remainders, the devise in the will as an execution of the power, not taking effect till the determination of the particular estate, was void, and brought an ejectment against the husband, and obtained a verdict(I). The husband then filed a bill for an injunction, and to rectify the mistake in the settlement. The defendant, by his answer, urged that the draft of the settlement might have been altered with a view to support the husband's claim, and insisted that parol evidence could not be received; but Sir Thomas Clark decreed, that the power appeared to have been designed so far to extend as to enable her to dispose of the interests in the estates after the determination of the coverture, and during the life of her husband, as well as to dispose of the inheritance of the estates after her husband's decease, and ordered the settlement to be rectified accordingly; but without costs on either side.

In the last case upon the subject(k), a conveyance of a portion of church-tithes upon a purchase was made, contrary to what was considered to be the true construc-

(k) *Rob v. Butterwick*, 2 Price, 190; and see *Beaumont v. Bramley*, 1 Turn. 41.

(I) The first point at least was clear at law, but the defendant set up an old term as a bar to the plaintiff's right to recover. The defence, however, did not succeed. See *Farmer dem. Earl v. Rogers*, 2 Wils. 26.

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tion of the written agreement, subject to a proportion of the rent reserved by the lease of the tithes ; and upon proof that this was done by the mistake of the *purchaser's* attorney, and that the rent had not been demanded for several years, the deed was after the lapse of several years rectified and made conformable to the written agreement(110).

If a settlement be made contrary to the intention of the (*)parties, merely to prevent a forfeiture(I), parol evidence

(I) In this case the settlement was to prevent the estate from being sequestered on account of the husband having been in arms for Charles the first. The decree was made in the reign of James his son. So

(110) See *Table v. Archer*, 3 Hen. & Munf. 399 ; as to marriage articles ; and where the English decisions are reviewed.

Under circumstances which denote fraud in omitting to reduce a part of an agreement into writing, the whole is open to parol proof. And, upon the basis of part performance, where possession has been taken or the acts done amount to part performance, the court may receive parol proof of the whole agreement, independent of or in connection with what may be in writing, in order to make out the contract. This principle was recognised in the late case of *Phyfe v. Wardell*, 2 Edwards' C. R. 47, where *Phyfe* held under a church lease ; and *Wardell & al.* contracted for the purchase thereof subject to a lease for a year of a part of the premises ; but the writing omitted to specify all the particulars of the contract ; but the defendants said it was well understood. After obtaining a renewal of the church lease, the defendants refused to execute the contract. The court overruled the demurrer put in by the defendants. " An objection is taken because part of the agreement is not in writing. The bill sets forth the reason of the omission : it was induced by the representations of the defendants, and the complainant confided in them. If they were now permitted to take advantage of the omission and hold the complainant strictly to the written memorandum as the only evidence of the agreement, this Court would be sanctioning the commission of a fraud. For the purpose of preventing such a consequence, this court, under the circumstances, is at liberty to disregard the writing and treat the transaction as a verbal contract. This principle appears to have been acknowledged by Ch. J. Thompson, before the Court of Errors, in *Parkhurst v. Van Cortland*, 14 Johns. R. 33.

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is admissible of the real intent of the parties(*l*), and the settlement will be rectified in conformity with it.

Where parties omit any provision in a deed, on the impression of its being illegal, and trust to each other's honor, they must rely upon that, and cannot require the defect to be supplied by parol evidence.

Thus in *Lord Irnham v. Child*(*m*), it appeared that Lord Irnham treated with Child for sale of an annuity. Upon settling the terms, it was agreed that the annuity should be redeemable; but both parties supposing that this appearing upon the face of the transaction would make it usurious, it was agreed that the grant should not have in it a clause of redemption; and it was accordingly drawn and executed without such a clause. Lord Thurlow refused to supply the omission. A similar decision was made by Mr. Justice Buller, when sitting in Chancery for the Lord Chancellor(*n*); and two similar determinations were made by Lord Kenyon, when Master of the Rolls(*o*).

(*) Upon these cases Lord Eldon observes, that they went upon an indisputably clear principle, that the parties did not mean to insert in the agreement a provision for re-

(*l*) *Harvey v. Harvey*, 2 Cha. Ca. 180, decided the same way, first by Sir Harbottle Grimston, then by Lord Nottingham, and afterwards by Lord Chancellor Jefferies; and see *Fitzgib.* 213, 214; see *Stratford v. Powell*, 1 Ball & Beatty, 1.

(*m*) 1 Bro. C. C. 92.

(*n*) *Hare v. Shearwood*, 1 Ves. jun. 241; 3 Bro. C. C. 168. See and consider *Haynes v. Hare*, 1 Hen. Blackst. 659(II).

(*o*) *Lord Portmore v. Morris*, 2 Bro. C. C. 219; 1 Hen. Blackst. 663, 664; *Rosamond v. Lord Melsington*, 3 Ves. jun. 40, n.

that as to the *nature* of the forfeiture, it is evident that the relief of equity would not have been afforded, for the purpose of *upholding* the settlement, except under the Restoration!

(II) Perhaps this case does not belong to this line of cases, but should be classed with those in which a term is omitted by mistake; of which *vide supra*.

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demption, because they were all of one mind that it would be usurious ; and they desired the Court to do not what they intended, for the insertion of that provision was directly contrary to their intention ; but they desired to be put in the same situation as if they had been better informed, and consequently had a contrary intention. The answer is, they admit it was not to be in the deed ; and why was the Court to insert it, where two risks had occurred to the parties ; the danger of usury, and the danger of trusting to the honor of the party ?

But fraud is in equity an exception to every rule. In the case of *Lord Irnham v. Child*, Lord Thurlow distinctly said, if the agreement had been varied by fraud, the evidence would be admissible. If the bill stated that the clause was intended to be inserted, but it was suppressed by fraud, he could not refuse to hear evidence read to establish the rule of equity. Lord Kenyon advanced the same doctrine in the cases before him, and Mr. Justice Buller also thought that parol evidence was, in such cases, admissible(*p*).

The only difficulty in these cases is, to ascertain what shall be deemed fraud. If parties merely agree to a term, and then execute an instrument in which the term is omitted, without objecting to the omission of it, the Court cannot relieve the injured party(*q*). So where a lessor drew a lease for one year, instead of twenty-one, and then read it for twenty-one years, the lessee brought his bill to be relieved ; but as he could read, it was deemed his own (*)folly ; and as the case was within the statute, his bill was dismissed with costs(*r*). Again, where in a lease the

(*p*) And see *Taylor v. Radd*, 5 Ves. jun. 395, cited ; *Henkle v. R. E. A. Office*, 1 Ves. 317 ; and see *Pitcairne v. Ogbourne*, 2 Ves. 375 ; *Countess of Shelburne v. the Earl of Inchiquin*, 1 Bro. C. C. 338.

(*q*) See *Rich v. Jackson*, 4 Bro. C. C. 514 ; *et supra*, p. 143.

(*r*) *Anon. Skin.* 159.

right to enter, cut, and carry away the trees, was reserved to the lessor, the lessee went into parol evidence to show that that was contrary to the original agreement, and proved a conversation previously to the execution of the lease, in which the landlord assured the lessee he should not cut the timber, and only reserved it in order that all his leases might be uniform. The plaintiff's counsel, however, gave up this part of the bill at the hearing(s), and Lord Rosslyn treated it as clearly wrong. So I am told that in a very recent case at law(*t*), *where a warrant of attorney* was given to confess judgment on the assurance of the creditor that no execution should issue for three years, and execution was, contrary to this parol agreement, issued immediately, the Court inclined, that as the defendant knew the contents, and had sufficient time to read the warrant of attorney, they could not relieve; and yet a court of law considers itself to have a considerable controlling power over its own judgments entered up under warrants of attorney, where the party entering them up has been guilty of a fraud(*u*). The case, however, went off on another ground(111).

In the *Countess of Shelburne v. the Earl of Inchiquin*(*x*), Lord Thurlow said, if two persons entrust a third person to draw up minutes of their intention, and such

(*s*) *Jackson v. Cator*, 5 Ves. jun. 688.

(*t*) *Gennor v. Macmahon*, M. T. 1806, B. R. .

(*u*) See 1 H. Blackst. 63, 664.

(*x*) 1 Bro. C. C. 350; and see *Crosby v. Middleton*, 3 Cha. Rep. 99; *Langley v. Brown*, 2 Atk. 195; *Baker v. Paine*, 1 Ves. 6.

(111) As to the validity of private agreements of parties, relating to the proceedings in a cause. See *Dunlop's Les. v. Speer*, 3 Binn. 169. *Plankenhorn v. Cave*, 2 Yeates, 370. Parol evidence is inadmissible to shew, that a levy and sale under a *fi. fa.* has been abandoned by the plaintiff, in contradiction of the sheriff's deed. The proper remedy, in such case, would be an application to the Court to set aside the sale. *Jackson v. Vanderhayden*, 17 Johns. Rep. 167.

person does not draw them according to such intention, that case might be relieved, because that would be a kind of fraud.

And it is said, that in the case of *Jones v. Sheriffe*(y), (*)there were heads of an intended lease taken by an attorney in writing ; but upon proof that some other clauses were agreed on between the parties at the same time, the Court decreed that those clauses should be put into the lease, notwithstanding the counsel on the other side strenuously insisted on the statute of frauds.

And if either party object to a conveyance, on the ground of a term of the agreement being omitted, and the other party promise to rectify it, whereupon the deed is executed, a specific performance of the promise will be enforced.

Thus in *Pember v. Mathers*,(z) a bill was filed for a specific performance of a parol agreement by a purchaser of a lease under written conditions, to indemnify the vendor against the rent and covenants ; and it was objected, on the part of the defendant, that the evidence was inadmissible, upon the ground, that where the parties have entered into a written agreement, no parol evidence can be admitted to increase or diminish such agreement. The rule, Lord Thurlow said, was right ; but where the objection was originally made, and promised by the other party to be rectified, it comes amongst the string of cases where it is considered as a fraud. Then the evidence is admissible. There being some doubt as to the fact, Lord Thurlow ordered it to go to law upon an issue, whether there was such a promise on the day of the execution of the agreement. Upon the trial, the jury found there was such a promise ; and the plaintiff had a decree for a specific performance(112).

(y) 9 Mod. 88, cited.

(z) 1 Bro. C. C. 52 ; see 14 Ves. jun. 524.

(112) See *Christ v. Diffieback*, 1 Serg. & Rawle, 464.

So we have before seen, that where it is stipulated that the agreement shall be reduced into writing, and either party fraudulently prevents the agreement from being (*)put into writing, equity will perhaps relieve the injured party(a).

And it is perfectly clear that where fraud is distinctly proved, or the jury infer it from the circumstances, an agreement is invalid at law, as well as in equity(b); but the reducing the agreement to writing is, in most cases, an argument against fraud.

But it must be remarked, that a deed will not be rectified in equity on the ground of mistake or fraud, to the prejudice of a *bona fide* purchaser, without notice.

Thus in the case of *Thomas v. Davis*(c), although the lands passed at law, yet as the mistake was clearly proved, the words were restrained as between the persons claiming under the wife, whose estate was comprised by mistake, and the heir of the husband, to whom the estate had passed by the error; but the same equity was not administered against the mortgagee, who was left in possession of the legal right which the generality of the conveyance had invested him with(113).

(a) *Vide supra*, p. 114.

(b) *Haigh v. De la Cour*, 3 Campb. 319; *Emanuel v. Dane*, 3 Campb. 299; *Solomon v. Turner*, 1 Stark. 51.

(c) *Supra*, p. 155; Reg. Lib. B. 1757, fol. 33, 34; 1 Dick. 301.

(113) The rights of creditors, particularly, will be protected. *M'Teer v. Sheppard*, 1 Bay, 461. *Fitzpatrick v. Smith*, 1 Des. 340. See *Strong v. Glasgow*, 1 Car. Law Rep. 279. *Hawkins v. Hawkins*, Id. 496. *Ross v. Norvell*, 1 Wash. 14. Although parol evidence cannot be received to contradict an instrument in writing, as between parties and privies; yet, the rule does not apply to strangers, who have an interest in knowing the truth. *Overseers of Berlin v. Overseers of Norwich*, 10 Johns. Rep. 229.

In Pennsylvania, where equity is a part of the law, fraud is a defence in all cases. Therefore in *Stubbs v. King*, 14 S. & R. 206, where the action was brought to recover the purchase money stipulated for in a (*170)

bond, held, that the defendant, under the plea of payment with leave to give special matter in evidence agreeably to the act in that state, might show by parol evidence a misrepresentation on the part of the vendor as to the boundaries of the land; and the execution of such bond was no extinguishment of the fraud. Gibson, J. in delivering the judgment of the Court. "At the trial, the defendant was permitted to prove that while he was treating for the purchase, the plaintiff showed as the boundary, lines which are since found not to be so in fact, and that the lines designated in the conveyance, exclude land which was shown to him as part of the tract. In England such a plea would not be tolerated in a court of law, notwithstanding in Mr. Chitty's Treatise on Pleading, (vol. 2, p. 495), there is a precedent for it; but the better opinion is, that only that sort of fraud which is committed in the execution of the instrument, can be pleaded at law. *Here*, where equity is a part of the law, fraud is a defence in all cases. But in the conveyance to the defendant, the land is described by metes and bounds; and it is argued that the evidence contradicted the deed, by showing that the land was sold by other boundaries; and it is also contended that the declarations of the grantor having been made *before* the execution of the deed, were inadmissible, all former stipulations being merged in the act, which is the consummation of the contract. It is generally true, that the execution of a conveyance is the fulfilment of all previous *bona fide* stipulations, because such stipulations are liable to be varied whilst negotiations are pending, the writing which perpetuates the evidence, is supposed to contain the whole contract. But where a continued misapprehension of material facts has been induced on the part of one, by the misrepresentations of the other, it is obvious that the execution of the writing ought not to extinguish the right of the injured party to show the fraud by which his assent to the contract was obtained. This is a particular head of equitable relief; in affording which it is said a deed cannot be set aside in part for fraud; but that it must be set aside *in toto*, even though innocent persons are interested under it. In our practice, the defence is considered as resting on the ground of want of consideration as a consequence of the fraud; and the relief is then only commensurate with the actual want of consideration.

But, in general, where a bond is given for the purchase money of land, and, before payment, it is discovered, that there are incumbrances existing, the plaintiff cannot recover, without deducting the amount of the incumbrances, although he has made a conveyance to the defendant with general warranty; but, where the incumbrances, with all the circumstances attending them, are known both by vendor and vendee, and the vendee takes from the vendor a deed, warranting particularly against those in-

cumbrances, and gives his bond for the purchase money, it is no defence in an action on the bond, to say, that the incumbrances were still existing. This was settled by the Court, Tilghman, C. J. in *Fuhrman v. Loudon*, 13 S. & R. 386, which was a case of legacies charged on the land.

In *Morris v. Buckley*, 11 S. & R. 168, where a *scire facias* was sued for the purpose of recovering the purchase money of land under a mortgage, which was claimed by another, whose title had been adjudged good as respected the mortgagor; held, that it was sufficient for the defendant to execute a release on receiving payment for the partial failure of title; and that there was no necessity to tender a conveyance.

(*)CHAPTER IV.

OF THE CONSEQUENCES OF THE CONTRACT.



SECTION I.

Of the Rule in Equity, that the Purchaser is entitled to the Estate from the Time of the Contract.

EQUITY looks upon things agreed to be done, as actually performed(*a*), (I)(114); consequently, when a contract is made for sale of an estate, equity considers the vendor as a trustee for the purchaser of the estate sold(*b*), and the purchaser as a trustee of the purchase-money for the vendor(*c*).

Therefore the contract will not be discharged by the bankruptcy of either the vendor(*d*) or vendee(*e*), (II).

(*a*) Francis's Maxims, max. 13; 1 Trea. Eq. chap. 6, sec. 9. See *Callaway v. Ward*, 1 Ves. 318, cited.

(*b*) *Atcherley v. Vernon*, 10 Mod. 518; *Davie v. Beardsham*, 1 Cha. Ca. 39; and *Lady Fohaine's case*, cited *ibid.*; and see 1 Term Rep. 601; and *Green v. Smith*, 1 Atk. 572.

(*c*) *Green v. Smith*, *ubi supra*; *Pollexfen v. Moore*, 3 Atk. 272.

(*d*) *Orlebar v. Fletcher*, 1 P. Wms. 737. The observation in *Goodwin v. Lightbody*, 1 Dan. 156, appears to be inaccurate.

(*e*) See 3 Ves. jun. 255; and *Bowles v. Rogers*, 6 Ves. jun. 95, n.; *Whitworth v. Davis*, 1 Ves. & Bea. 545.

(I) A lessee insured his house, the lease expired, and he contracted for a new lease. Then the house was burned, and the office insisted that at the time of burning it was not the plaintiff's house; but Lord Chancellor King, and afterwards the House of Lords, held otherwise. See printed cases, Dom. Proc. 1730.

(II) As to the effect of an extent subsequently to a contract, see *Rex v. Snow*, 1 Price, 220, cited.

(114) See *Craig v. Leslie*, 3 Wheat. 578.

(*)But an act of bankruptcy, upon which a commission has not issued, will prevent the execution of the agreement, as neither a buyer nor a seller can be assured that a commission may not issue in due time, in which case he could not retain the estate or money against the assignees(*f*).

The Bankrupt Act, 6 Geo. 4(*g*), enacts, that if any bankrupt shall have entered into any agreement for the purchase of any estate or interest in land, the vendor thereof, or any person claiming under him, if the assignees of such bankrupt shall not (upon being thereto required) elect whether they will abide by and execute such agreement, or abandon the same, shall be entitled to apply by petition to the Lord Chancellor, who may thereupon order them to deliver up the said agreement, and the possession of the premises, to the vendor, or person claiming under him, or may make such other order therein as he shall think fit.

The death of the vendor or vendee before the conveyance(*h*) or surrender(*i*), or even before the time agreed upon for completing the contract, is in equity immaterial(*k*).

If the vendor die before payment of the purchase-money, it will go to his executors, and form part of his assets(*l*); and even if a vendor reserve the purchase-money, payable as he shall appoint by an instrument,

(*f*) *Lowes v. Lush*, *Franklin v. Lord Brownlow*, 14 Ves. jun. 547, 550.

(*g*) c. 16, s. 76.

(*h*) *Paul v. Wilkins*, Toth. 106.

(*i*) *Barker v. Hill*, 2 Cha. Rep. 113.

(*k*) *Winged v. Lefebury*, 2 Eq. Ca. Abr. 32, pl. 43; cases cited *ante*, n. (*b*).

(*l*) *Sikes v. Lister*, 5 Vin. Abr. 541, pl. 28; *Baden v. Earl of Pembroke*, 2 Vern. 213; *Bubb's case*, 2 Freem. 38; *Smith v. Hibbard*, 2 Dick. 712; *Foley v. Percival*, 4 Bro. C. C. 419; and see *Gilb. Lex Praetor*. 243.

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executed in a particular manner, and afterwards exercise (*)his power, the money will, as between his creditors and appointees, be assets(*m*).

If the estate is under a contract for sale at the date of the will, a devise of it to be sold for a charity, will not give the purchase-money to the charity, in consequence of the mortmain act, as it is called(*n*), although this point was in the first instance otherwise decided(*o*)(115).

A vendee being actually seised of the estate in contemplation of equity, must, as we shall hereafter see, bear any loss which may happen to the estate between the agreement and conveyance, and will be entitled to any benefit which may accrue to it in the interim(*p*); but if he obtain possession of the estate before he has paid the purchase-money, and begin to cut timber, equity will grant an injunction against him(*q*).

If the purchaser was tenant at will of the estate, the contract determines the tenancy. And even if he was tenant for a term certain, the agreement determines the relation of landlord and tenant, and in equity, at least, the landlord cannot call for rent(*r*).

It is a consequence of the same rule, that a purchaser may sell or charge the estate, before the conveyance is executed(*s*)(116); but a person claiming under him must

(*m*) *Thompson v. Towne*, 2 Vern. 319; 466.

(*n*) *Harrison v. Harrison*, 1 Russ. and Myl. 71; 1 Taunt. 273.

(*o*) *Middleton v. Spicer*, 1 Bro. C. C. 201.

(*p*) See *post*, ch. 5.

(*q*) *Crockford v. Alexander*, 15 Ves. jun. 138.

(*r*) *Daniels v. Davison*, 16 Ves. jun. 249.

(*s*) *Seton v. Slade*, 7 Ves. jun. 265; and see 1 Ves. 220; and 6 Ves. jun. 352. *Wood v. Griffith*, 12 Feb. 1818. MS. see *post*.; 2 Ball & Beat. 522.

(115) See *Baptist Association v. Hart's Exrs.* 4 Wheat. 1; and note I. of the appendix to the same volume, on the subject of charitable bequests, where the principal authorities relating to charities are collected.

(116) See *Barton v. Rushton*, 4 Des. 373.

submit to perform the agreement *in toto*, or he cannot be relieved(*t*).

(*) So he may devise the estate, if freehold(*u*)(117), before the conveyance ; and if copyhold, before the surrender(*w*) ; and that ,although the estate is contracted for at a future day(*x*), or the contract is entered into by a trustee for him(*y*) ; and the devisee will be entitled to have the estate paid for out of the personal estate of the purchaser(*z*)(118).

If a contractor for an estate by his will give a legacy, which he directs to be raised by sale of the estate, and the contract is afterwards vacated, the legacy will be payable out of the general assets(*a*).

The rule that an estate contracted for may be devised before it is conveyed or surrendered to the purchaser, has now become a land-mark, and could not be shaken without endangering the titles to half of the estates in the kingdom. The applicability of the rule to freehold estates

(*t*) See *Dyer v. Pulteney*, Barnard. Rep. Cha. 160 ; a very particular case.

(*u*) *Darris's case*, 3 Salk. 85 ; *Milner v. Mills*, Mose. 123 ; *Alleyn v. Alleyn*, Mose. 262 ; *Atcherley v. Vernon*, 10 Mod. 518 ; *Gibson v. Lord Montfort*, 1 Ves. 485.

(*w*) *Davie v. Beardsham*, 1 Cha. Ca. 39 ; *Nels. Cha. Rep.* 76 ; 3 Cha. Rep. 2 ; *Greenhill v. Greenhill*, 2 Vern. 679 ; *Prec. Cha.* 329 ; *Atcherley v. Vernon*, 10 Mod. 518 ; *Robson v. Brown*, Oct. 1740, S. P. ; and see 9 Ves. jun. 510.

(*x*) *Commissioner Trimuel's case*, Mose. 265, cited ; and see *Atcherley v. Vernon*, 10 Mod. 518 ; *Gibson v. Lord Montfort*, 1 Ves. 485.

(*y*) *Greenhill v. Greenhill*, 2 Vern. 679.

(*z*) *Milner v. Mills*, Mose. 123 ; *Broome v. Monck*, 10 Ves. jun. 597.

(*a*) *Fowler v. Willoughby*, 2 Sim. and Stu. 354. *Qu.* When was the contract rescinded ? The legacy was considered a demonstrative one.

(117) See *M'Kinnon v. Thompson*, 3 Johns. Ch. Rep. 307, 310. *Livingston v. Newkirk*, 3 Johns. Ch. Rep. 312, 316.

(118) See *Livingston v. Newkirk*, 3 Johns. Ch. Rep. 316.

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has, I believe, never been questioned, but in *Ardesoife v. Bennet*(*b*), where the point arose as to a copyhold estate, Sir Thomas Sewell decided the case on another ground, and appears to have avoided sanctioning the rule in question ; and in a manuscript note of this case by the name of *Wilson v. Bennet*, it is said that the Master of (*)the Rolls was of opinion that the copyhold estate did not pass by the will. This opinion was clearly extra-judicial, and cannot be deemed subversive of the numerous cases which have established the contrary doctrine ; and, indeed, in a case before Sir Thomas Sewell, a few years after that of *Ardesoife v. Bennet*, he seems to allude to a devise of a copyhold estate contracted for, as sanctioned by practice(*c*).

An estate contracted for will pass by a general devise of all the lands purchased by the testator, although he may have purchased some estates which have been actually conveyed to him, and would therefore of themselves satisfy the words of the will(*d*).

On the other hand, it seems that estates recently purchased *and actually conveyed*, will pass with estates contracted for, by a general devise of all the manors, &c. for the purchase whereof the testator has *already* contracted and agreed(*e*)(*I*). But a devise of estates "for the purchase whereof the testator has *only* contracted and agreed," would not pass estates actually conveyed to him

(*b*) 2 Dick. 403 ; and see 15 Ves. jun. 391, 392, n.

(*c*) *Floyd v. Aldridge*, 1777, 5 East, 137, cited ; and see *Vernon v. Vernon*, 7 East, 8.

(*d*) *Atcherly v. Vernon*, 10 Mod. 518.

(*e*) *St. John v. Bishop of Winton*, Cowp. 94 ; *Lofft*, 113, 349, S. C. ; and 2 Blackst. 930.

(*I*) This, however, must depend upon the particular circumstances of each case. The case referred to can scarcely be cited as a binding authority establishing a general rule. It seems that the House of Lords was taken by surprise in affirming the judgment.

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before the will, unless perhaps they were recently purchased, and the testator had not contracted for any other estate.

If a man possessed of a term of years contract for the purchase of the inheritance, the term, by construction of equity, instantly attends the inheritance; and therefore, by a devise of the estate subsequently to the contract, the (*)fee-simple would pass, although not actually conveyed, and the term as attendant on it(*f*).

And if the purchaser had, previously to the purchase, made his will, by a general bequest in which the term would have passed, yet the legatee will not be entitled to it, although the bequest be not expressly revoked; because the term, by the construction of equity, attended the inheritance immediately on the purchase of the fee, and it must therefore follow it in its devolution on the heir or devisee(*g*).

The relation of vendor and purchaser in such a case, where it is formed by a conveyance of the inheritance, puts an end to the covenants, though ever so large and general, which existed between lessor and lessee(*h*).

The same rule, it seems, must prevail where the term is even *specifically* bequeathed; for if the fee had been actually conveyed, the conveyance would have operated as a revocation(*i*); and as the vendee is seised of the fee in contemplation of equity, although the conveyance be not executed, the same rules ought to be adhered to in each case.

Although the estate may, subsequently to the will, be

(*f*) *Per* Sir Wm. Grant, in *Capel v. Girdler*, Rolls, 16 May 1804, MS.; 9 Ves. jun. 509; *Cooke v. Cooke*, 2 Atk. 67.

(*g*) *Capel v. Girdler*, *ubi sup.*

(*h*) See 1 Bligh, 69.

(*i*) *Galton v. Hancock*, 2 Atk. 424, 427, 430.

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conveyed, or surrendered, either to the purchaser(*k*), or to a trustee for him(*l*), yet that will not operate as a revocation of his will(*l*). The legal estate will of course descend to

(*k*) *Parsons v. Freeman*, 3 Atk. 741; Amb. 116; and see 1 Ves. jun. 256; 2 Ves. jun. 429, 602; 6 Ves. jun. 220; 8 Ves. jun. 127; and *Prideux v. Gibbin*, 2 Cha. Ca. 144.

(*l*) *Jenkinson v. Watts*, Lofft, 609, reported; cited *nom.* *Watts v. Fullarton*, Dougl. 718; *Rose v. Cunynghame*, 11 Ves. jun. 550.

(*l*) In *Brydges v. Duchess of Chandos*, 2 Ves. jun. 429, Lord Rosslyn, in treating of this point, said, "Another case is supposed to arise, in which this Court determines upon a principle of equity, it is not said directly against the rule of law, but without attending to what the law would be; that is the case where an equitable estate is devised, and after the will the legal estate is taken, the Court has said that does not revoke the will. It is difficult to state that, at this time of day, in a court of law, which could not look at the equitable interest, but looks only at the legal; but as the legal interest is only a shadow, the justice of the case is very evident; but it is a decision in conformity to the like case at law. The very case occurred at law in Roll. Abr. 616, pl. 3. *Cestui que use*, before the *statute of uses*, devises; afterwards the feoffees made a feoffment of the land to the use of the devisor; and after the statute the devisor dies; the land shall pass by the devise; because, after the feoffment, the devisor had the same use which he had before. That is exactly the case of an equitable estate devised, and a conveyance taken afterwards of the legal estate; and this Court was so far from determining without considering what the rule of law would be, that here is the very point decided by a court of law.

The case referred to is thus stated in Rolle:—"Si home aiant feffees a son use devant le statut de 27 H. 8. ust devise le terre al auter, et puis les feffees font feffment del terre al use del devisor et puis le statut le devisor morust, le terre passera per le devise, car apres le feffment le devisor avoit mesme l'use que il avoit devant."

The case then appears to be this. The *cestui que use* made his will, and the feoffees afterwards made a feoffment of the lands to his use; that is, enfeoffed other persons to the use of him. This appears by the reason given for the decision, namely, "because after the feoffment the devisor had the same use which he had before." Whereas, if the facts of the case were as Lord Rosslyn supposed, the devisor would, before the feoffment, have been a mere *cestui que use*, entitled at law to neither *jus in re*, nor *jus ad rem*; and after the feoffment he would have been

(*)the heir at law, and he will in equity be deemed a mere trustee for the devisee, unless the devisee, thinking the

actually clothed with the legal seisin of the estate; the case, therefore, seems only a decision, that where a man devises an equitable estate, a transfer of the legal estate to other persons, in trust for him, is not a revocation of his will. And such is still the rule of law (*Doe v. Pott*, Dougl. 2d edit. 710.) as well as of equity, *Jenkinson v. Watt*, Lofft, 609.

It may, however, be objected, that the devisor did not die till after the statute of uses; and therefore admitting the force of the foregoing remarks, it still appears that the legal estate was, by the operation of the act, vested in the devisor. To this it may be answered, that the statute was expressly passed to prevent alienation of estates by devise, although it declared that wills made before the statute, by persons who were or should be dead before the 1st of May 1536, should not be invalidated by the act. We must therefore presume that the devisor died before that time; otherwise the will would have been void by virtue of the act itself, as was expressly decided in a case where *cestui que use* before the statute devised the use; and then came the statute, which transferred the use into possession; and although the testator survived *the statute of wills*, yet the operation of the statute of uses was holden to be a revocation, *because the use was thereby gone*. 1 Roll. Abr. 616, (R.) pl. 2; *Putbury v. Trevalion*, Dyer, 142, b.—Indeed the statute of uses could not have come in question in the above case, if the feoffment had been made to the devisor himself.

Lord Hardwicke seems to have construed the case in Rolle in the same manner as Lord Rosslyn did, (see *Sparrow v. Hardcastle*, 3 Atk. 798; Ambl. 224), although he appears to have been struck with the reason given for the decision; in explanation of which, he is in Atkyns stated to have said, “The use at law was the beneficial and profitable interest, the same as a trust in equity, and which remained in the same manner after the feoffment as before, and the feoffees there granted the dry legal estate to the devisor.” In Ambler, his Lordship is reported to have said, “Thus the law considers two interests in the land: the legal estate, and the use: now the use remains the same at the making the devise, and at the death of the devisor; and therefore accepting the grant of the feoffees makes no alteration in it.”

Lord Hardwicke’s attempt to reconcile what he conceived to be the decision in this case, with the reason given for it, evinces the impossibility of making them consistent. According to his argument, the equitable interest was not merged by its union with the legal estate, but still subsisted in the contemplation of law.

In the case of *Willet v. Sandford*, 1 Ves. 186, Lord Hardwicke (*177)

estate did not pass by the will, permit the heir to take the estate, and acquiesce in this for a long while ; in which case equity will not relieve him(*m*).

(*) But in analogy to the decisions upon legal estates(*n*) it has been held, that a devise of a freehold estate contracted for, is revoked by a subsequent conveyance to the (*)usual uses to bar dower(*o*), even where the contract was by parol(*p*), but it is difficult to say, in the latter case, that a conveyance to the usual uses to bar dower is not within the contract of the parties. If, however, it were stipulated in the contract that the estate should be conveyed to the purchaser in fee, or to such uses as he should appoint, a conveyance to uses to bar dower, would not, it is apprehended, operate as a revocation of the will.

(*m*) *Davie v. Beardsham*, 1 Cha. Ca. 39 ; and see *Pigott v. Waller*, 7 Ves. jun. 98.

(*n*) See *Tickner v. Tickner*, 3 Atk. 742, cited ; *Kenyon v. Sutton*, 2 Ves. jun. 600, cited ; and *Nott v. Shirley*, *ibid.* 604, n. ; and see 2 Ves. jun. 429, 600 ; 6 Ves. jun. 219 ; 8 Ves. jun. 115, 211 ; 10 Ves. jun. 249, 256. See also *Luther v. Kidby*, 3 P. Wms. 170, n. and observe the distinction.

(*o*) *Rawlins v. Burgis*, 2 Ves. & Bea. 382. There was an appeal to the Lord Chancellor, which was for particular reasons withdrawn. It is a point of great interest and nicety.

(*p*) *Ward v. Moore*, 4 Madd. 368.

classed the different interests in land into three kinds : First, the estate in the land itself ; the ancient common-law fee. Secondly, the use ; *which was originally a creature of equity* ; but since the statute of uses it draws the estate in land to it ; so that they are joined, and make one legal estate. Thirdly, the trust ; *which the common law takes no notice of*, but which carries the beneficial interests and profits *into this court*, and is still a creature of equity, as the use was before the statute.

This judicious classification proves (what indeed could not be doubted), that the true principles of this subject were familiar to this great master of equity, and that he was led into a false argument by endeavoring to account for a principle which did not exist.

Upon the point in this note, see further, n. (*a*) to 2 Ves. & Bea. 385, and note(I) to *Treat. Powers*, 5th edit. p. 155.

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Estates contracted for *after* the will, will not pass by it(*q*)(119); nor will lands pass by the will, although conveyed to the purchaser subsequent to his will *in pursuance of a contract prior to the will*, unless it was a valid binding contract(*r*). But in these cases the heir at law will be entitled to the estate for his own benefit, (*)and if not paid for, the purchase-money must be paid out of the personal estate of his ancestor(*s*), and that, although he unite in himself the three characters of vendor, heir, and executor(*t*). The estate will, however, be assets in the hands of the heir.

So if the purchaser die intestate, the heir will in like manner be entitled to have the estate purchased for him(120): and if his ancestor die before the conveyance

(*q*) *Langford v. Pitt*, 2 P. Wms. 629; *Alleyn v. Alleyn*, Mose. 262; *Potter v. Potter*, 1 Ves. 437; and see 1 Atk. 573; *White v. White*, 2 Dick. 522; Reg. Lib. B. 1775, fol. 650.

(*r*) *Rose v. Cunynghame*, 11 Ves. jun. 50.

(*s*) *Milner v. Mills*, Mose. 123; and see 2 P. Wms. 632; 3 P. Wms. 224; *Broome v. Monck*, 10 Ves. jun. 597.

(*t*) *Coppin v. Coppin*, Sel. Cha. Ca. 28; 2 P. Wms. 291.

(119) See *Jackson v. Potter*, 9 Johns. Rep. 312. *Jiggits v. Maney*, 1 Murph. 258. *Johnson v. Hanley*, Tay. 305. *Cogdell v. Cogdell*, 3 Des. 346. *Livingston v. Newkirk*, 3 Johns. Ch. Rep. 312. *Smith v. Codrington*, 8 Cranch, 66. *McKinnon v. Thompson*, 3 Johns. Ch. Rep. 307. *Burke v. Young's Les.* 2 Serg. & Rawle, 387. Under the statute of *Virginia*, relating to wills, after acquired lands may pass by will, provided such be the clear intention of the testator. *Smith v. Codrington*, ut supra. It is a rule of the common law, that a will, as to lands, speaks at its date, and as to personal property, at the time of the testator's death. Id.

(120) *Champion v. Brown*, 6 Johns. Ch. Rep. 398, 402. *Livingston v. Newkirk*, 3 Johns. Ch. Rep. 312.

"In Pennsylvania, having no Court of Equity, we are compelled to consider that as done, which Chancery would enforce the performance of, and this is the reason why an action of ejectment may be supported in this state on an equitable title. Per Gibson, J. in *Vincent v. Huff*, 4 S. & R. 301. Therefore, where one has contracted for the purchase

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is executed, the heir may devise, charge, or sell the estate, in the same manner as the ancestor himself might have done(*u*).

If the executor complete the purchase, and take the conveyance in his own name, he will be a trustee for the heir or devisee(*v*). And if the assets cannot be got in, and the real representative pay for the land out of his own pocket, he may afterwards call upon the personal estate to reimburse him(*x*). So, if the personal estate is insufficient to perform the contract, and the agreement

(*u*) *Langford v. Pitt*, 2 P. Wms. 629.

(*v*) *Alleyn v. Alleyn*, Mose. 262.

(*x*) See 10 Ves. jun. 614, 615.

of land, paid the money and received possession, he is regarded in the light of a vendee with a deed executed and delivered to him. *Moody v. Vandyke*, 4 Binn. 41. But, where the plaintiff claiming under an equitable title, had been in possession; and had made improvements; but had not paid or tendered the purchase money; and the Court at the trial laid it down in general terms only, that if the purchase money was paid, the plaintiff might recover, yet because the converse of the proposition was not stated to the jury, the Court ordered a new trial. 4 S. & R. 298, *supra*.

The point decided in *Harris v. Bell*, 10 S. & R. 39. was, that if no time be stipulated in the agreement for the sale in respect to the possession; but the vendee is permitted by the vendor to take possession before the time agreed upon for the payment of the money; the money not being paid, the vendor forcibly regains the possession: held, that the vendee was entitled to recover the possession without a previous tender of the purchase money, on the ground, that the vendor having put the vendee into possession before payment of the money, it amounted to a waiver of the payment. But ejectment is in the nature of a bill for specific performance; but if the vendee declines paying the purchase money; and the time has elapsed, the vendor can recover the possession. The remedies for vendor and vendee, are mutual; for ejectment will lie against vendor by vendee on articles of agreement, after tender of the purchase money. 4 Binn. 177. And where the vendee has paid part of the money; and declined payment of the residue, still the vendor may recover in ejectment in such case. *Martin v. Willink et al.* 7 S. & R. 297.

is on that account rescinded, yet the heir or devisee will, it should seem, be entitled to the personalty as far as it extends. And it has been decided, that if by reason of the complication of the testator's affairs, the purchase-money cannot be immediately paid, and the vendor for that reason rescinds the contract, yet on the coming in of the assets, the devisee of the estate contracted for may compel the executor to lay out the purchase-money in the purchase of other estates for his benefit(y).

But if the heir not being entitled to have the estate paid for out of the personal estate, actually obtain and (*)apply the personal estate in payment of the purchase-money, the persons entitled to the personal estate will not be entitled to the land, but only to a charge on it for the amount of the money wrongly applied(z).

Any codicil executed according to the statute of frauds will amount to a re-publication of a prior will of lands; and therefore, if a purchaser, previously to a contract, make a *general devise of all his lands*, and after the contract execute a codicil, according to the statute of frauds, unless an intention appear not to affect it(a), the after-purchased estate will pass under the devise in the will(121),

(y) *Whittaker v. Whittaker*, 4 Bro. C. C. 31; *Broome v. Monck*, 10 Ves. jun. 597. *Vide infra*. See *Mark v. Willington*, 1 Beatty, 128.

(z) *Savage v. Carroll*, 1 Ball. & Beatty, 265. See *post*, ch. 15, s. 3.

(a) *Lady Strathmore v. Bowes*, 7 Term. Rep. 482; 2 Bos. & Pull. 500; *Smith v. Dearmer*, 3 You. & Jerv. 278. *Monypenny v. Bristow*, 2 Russ. & Myl. 117.

(121) The republication of a will, to be effectual to pass lands acquired subsequently to the will, must be attended with all the legal formalities. *Jackson v. Potter*, 9 Johns. Rep. 312. *Jackson v. Holloway*, 7 Johns. Rep. 394. See *Burke v. Young's Les.* 2 Serg. & Rawle, 387. In *South Carolina*, so far as regards personal property acquired after the will, a republication need not be in writing, or in any particular form; but the rule in regard to real estate is otherwise. *Cogdell v. Cogdell*, 3 Des. 366.

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although legacies only are given by the codicil, and no notice is taken of the estate(*b*).

It has been thought that this rule would not apply where the devise in the will is of "the estates of which I am *now* seised;" but the codicil makes the will speak as from the date of the codicil, and therefore there seems to be no solid ground for the supposed distinction.

And if a purchaser, previously to a contract, by a will duly executed according to the statute, direct his after-purchased lands to be conveyed to the uses of his will and make a provision for his heir at law, and afterwards die without republishing his will, and the after-purchased lands devolve on the heir at law, equity will put the heir to his election, and not permit him to take both the descended estate, and the provision made for him by the will(*c*). But to raise a case of election the words (*) must be unequivocal; and therefore a direction to executors to sell whatever real estates the testator might die possessed of, was held not to mean after-purchased estates(*d*). And yet a devise and bequest of all my estate, rent and effects, real and personal, which I shall die possessed of, has since been decided to have that operation(*e*).

In purchasing, therefore, of an heir at law who claims an estate conveyed to his ancestor after the date of his will, the purchaser should be satisfied of three points: viz. 1st, That the contract was not entered into by the testator previously to making his will. 2dly, That no

(*b*) *Barnes v. Crowe*, 1 Ves. jun. 486; *Pigott v. Waller*, 7 Ves. jun. 98; *Goodtitle v. Meredith*, 2 Mau. & Selw. 5; *Hulme v. Heygate*, 1 Merr. 285.

(*c*) *Thellusson v. Woodford*, MS. 13 Ves. jun. 209, affirmed in Dom. Proc.; and see *Treat. of Powers*, ch. 6, sect. 2, div. II.

(*d*) *Back v. Kett*, 1 Jac. 534. *Johnson v. Telford*, 1 Russ. & Myl. 244.

(*e*) *Churchman v. Ireland*, 1 Russ. & Myl. 250.

codicil was afterwards executed by him, according to the statute of frauds, by which the lands, although not in contemplation, passed. And, 3dly, If the will affects to pass all the estates which the vendor might thereafter acquire, that the heir at law does not take any interest under the will.

And here we may observe, that if a man make a disposition by will of all his copyhold estates generally, and afterwards purchase other copyhold estates, and surrender them to the uses declared by his will(*f*), or even to the uses declared by his will *of and concerning the same*(*g*), the after-purchased estates will pass under the general devise, although the will was not re-published. Therefore, where a copyhold estate has been surrendered to the use of a will, and the purchaser is buying of the heir at law, who claims in the absence of any devise subsequently to the purchase by his ancestor, he must be satisfied that the (*)estate did not pass under any general devise in a will prior to the purchase. This point is not likely to arise, since the act for rendering a surrender to a will unnecessary(*h*).

From the time of the contract, the purchaser, and not the vendor, being owner of the estate in equity, it follows, that if a man devise his estate, and afterwards contract for the sale of it, the devise will thereby be revoked in equity(*i*)(122).

(*f*) Heylyn, *v.* Heylyn, Cowp. 130 ; Lofft, 604. This point has since been so decided at *nisi prius*.

(*g*) Attorney-general *v.* Vigor, 8 Ves. jun. 256. See Smart *v.* Pruejean, 6 Ves. jun. 565 ; and the last ed. of Gilbert on Uses, n.(5), p. 72.

(*h*) 55 Geo. 3. c. 192.

(*i*) Ryder *v.* Wager, and Cotter *v.* Layer, 2 P. Wms. 332, 623 ; and see 2 Ves. jun. 436 ; Vawser *v.* Jeffrey, 16 Ves. jun. 519 ; 3 Russ. 479.

(122) It is a settled principle in equity, that if a conveyance be only for a partial purpose, as to introduce a charge upon the estate, and does (*183)

And even where an estate was by a will directed to be sold, and the money to be paid to certain persons, and the testator himself afterwards sold the estate, it was held, that the legatees were not entitled to the money produced by the sale(*j*).

If, however, an agreement be such as a court of equity will not carry into execution against the representatives, there seems ground to contend that it will not revoke the will, because the agreement can operate as a revocation in equity only ; and therefore, if equity will not sustain the agreement in respect of which the will is held to be revoked, there appears to be no solid reason why the devise of the estate should not take effect. In *Onions v. Tyrer*(*k*) the Lord Chancellor held, that a second will, devising lands to the same person as the former, and revoking all former wills, but not duly executed, should never revoke the former will so as to let in the heir ; *nay, if by the latter will the premises in question had been given to a third person, it should never have let in the heir, in regard the meaning of the second will was to give the second devisee what it had taken from the first, without any consideration* (*)*had to the heir ; and if the second devisee took nothing, the first would have lost nothing.*

These principles ought, perhaps, to be referred to the words of the statute of frauds(*l*) ; but still as an agreement is only an equitable revocation, the same reasoning applies to the case before us. Where a man contracts for the sale of his estate, he intends to increase his personal

(*j*) *Arnald v. Arnald*, 1 Bro. C. C. 401 ; 2 Dick. 645. *Kenbold v. Roadknight*, 1 Russ. & Myl. 677 ; 1 Toml. 492.

(*k*) 1 P. Wms. 345. See 7 Ves. jun. 379.

(*l*) See Pow. Dev. 641.

not affect the interest of the testator beyond that special purpose, it is only a partial revocation of the will ; and equity will hold the party a trustee, not for the heir, but for the devisee. *Livingston v. Livingston*, 3 Johns. Ch. Rep. 155. per KENT.

estate, and not to benefit his heir; and if the Court will not carry the agreement into a specific execution for the benefit of the personal estate, "the personal estate takes nothing, and the devisee can have lost nothing."

- In the two cases(*m*) in which it has been holden, that an agreement will revoke a will in equity, it makes a term of the proposition, that the agreement amounts in equity to a conveyance. And it should seem that Lord Eldon was of this opinion, for in *Knollys v. Alcock*(*n*), where it was contended that an agreement in equity is a revocation only where it can be performed, his Lordship did not
- deny the rule as stated, but showed, that the agreement in that case was such as equity would perform(*o*), (*I*); and in *Clynn v. Littler*(*p*), Lord Mansfield laid it down, that covenants had never been allowed to be revocations, *unless where the covenantee has a right to a specific performance*.

(*) Whether an *abandonment* of an agreement will prevent the contract from operating as a revocation of a prior will, seems to be a more doubtful point. In the case of *Knollys v. Alcock*, before referred to, it was also contended, that an agreement which was abandoned was not a revocation in equity; but Lord Eldon said, he did not admit, that if there is an agreement in equity which at the moment is a completely operative revocation, a subsequent abandon-

(*m*) *Ryder v. Wager*, and *Cotter v. Layer*, *ubi sup.*

(*n*) 7 Ves. jun. 558. There was an appeal from the decision in this case, which has been compromised; and see *Mayor v. Gowland*, 2 Dick. 563. See also 2 Ves. jun. 436.

(*o*) See *Savage v. Taylor*, Cases T. Talb. 234.

(*p*) 1 Blackst. 345.

(*I*) It appears by an abstract of the title to the estate, in respect of which the litigation in *Savage v. Taylor* was commenced, that the heir at law of the testator, in his answer to the bill of the devisee, insisted that if the will was originally valid, yet it was revoked by the articles for sale, although the Court ought not to carry them into execution.

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ment will of necessity set up the will. His Lordship added, that he did not say whether it would be so or not, for he was of opinion he could not raise the question in the case before him, as the agreement was never abandoned. Sir Wm. Grant upon the same point said, that he very much doubted whether the abandonment of the contract in the testator's life-time would set up the will without a republication. But where the will is revoked *at the testator's death* by the contract, of course no subsequent event can render the will operative and effectual(*q*). In the first case in the books(*r*), in which the question arose whether a covenant to convey an estate devised should operate at law as a revocation of the will, it was holden, that such a covenant without more, was not any revocation of the will; because perhaps the devisor's intention would alter before performance of the covenant. At law, therefore, a contract does not revoke the will; but a conveyance in pursuance of the contract would of course operate as a revocation, or to speak more technically, as an ademption. Now it may be contended, that the same rule must prevail in equity, and that a contract for sale ought not to affect the validity of a prior will, until it is carried into execution, or, which in equity is tantamount to a conveyance, until the Court decree a specific performance of it. (*) While an agreement rests *in fieri*, and the validity of it has not been acknowledged by a decree, it seems equitable that the owner should be at liberty, with the concurrence of the other party, to alter his mind. Indeed in the absence of intention there seems to be no weighty distinction between an agreement which has been abandoned, and an agreement which equity will not perform. If a man make a second will without expressly revoking the first, and afterwards cancel the second will, the first is revived,

(*q*) *Bennett v. Lord Tankerville*, 19 Ves. 170.

(*r*) *Montague v. Jefferies*, 1 Ro. Abr. 615, (P.) pl. 3.

the second will being considered only intentional(s); and although it is true that a will is ambulatory till the death of the testator, yet the same ground may be taken in support of a will impliedly revoked by an agreement afterwards abandoned. Why should not a mere agreement be deemed ambulatory till it is completed, when it is clear that the parties may rescind the agreement, and the estate of the devisor is not altered so as to effect a revocation at law?

The seller after the contract and before the conveyance is not considered so absolutely a trustee as to prevent the estate from passing by a devise by him, subsequently to the contract, of his real estate to trustees to sell(*t*). But where an estate under contract was devised expressly by name, it was held that the legal estate only passed to enable the devisee to carry the contract into execution, and that the devisee was not entitled to the purchase-money beneficially(*u*). The principle of this decision will necessarily furnish many exceptions to the rule laid down in the case of *Wall v. Bright*.

When an estate is contracted to be sold, it is in equity (*)considered as converted into personalty from the time of the contract(*I*); and this notional conversion takes

(s) *Goodright v. Glazier*, 4 Burr. 2512.

(t) *Wall v. Bright*, 1 Jac. & Walk. 490.

(u) *Knollys v. Shepherd*, 1 Jac. & Walk. 499, cited. This case was affirmed in 1825 in Dom. Proc. MS. The decision depended upon the particular terms of the devise.

(I) The decision in the case of *Foley v. Percival*, 4 Bro. C. C. 419, seems to depend on the personal estate having been charged with the legacies; and the *dictum* of the Lord Chancellor, that an estate contracted to be sold, is not converted into personalty, where it will disappoint the testator's intention as to the payment of legacies charged upon the estate by his will, appears not to be warranted by either principle or authority. The case of *Comer v. Walkley*, 2 Dick. 649, is misreported. See *post*, ch. 9.

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place, although the election to purchase rests merely with the purchaser(*v*)(123).

Thus in a case before Lord Kenyon, at the Rolls(*x*), Whitmore demised to Douglas for seven years, with a covenant, that if the tenant, after the 29th of September 1761, and before the 29th of September 1765, should choose to purchase the inheritance for 3,000*l.*, Whitmore would convey to him(II). In 1761, before any election, Whitmore died, and left all his real estate to Bennett in fee, and all his personal estate to Bennett and his sister equally. In 1765, before the time mentioned, Waller, who purchased the lease and benefit of the agreement from Douglas, called on Bennett to convey for 3,000*l.*; which conveyance was made in consideration of that sum. Afterwards the sister and her husband filed a bill against the representative of Bennett, claiming a moiety of the 3,000*l.* and interest, and it was decreed accordingly.

This case has been recently followed by Lord Eldon(*y*). But it must be observed, that until the option is declared, the rents belong to the heir or devisee.

Upon the same principle it has been determined, that

(*v*) *Lawes v. Bennett*, 7 Ves. jun. 436; 14 Ves. jun. 596, cited; S. C. cited, 16 Ves. 253, 254, *nom.* *Douglas v. Whitrong*; *Ripley v. Waterworth*, 7 Ves. jun. 425.

(*x*) Whitmore's case, *ubi sup.*

(*y*) *Townley v. Bedwell*, 14 Ves. jun. 19.

(II) As to rights of pre-emption given by will, and the mode in which they will be carried into execution, see *Earl of Radnor v. Shafto*, 11 Ves. jun. 448; as to a right of pre-emption of timber, which a lessee is authorized to cut down, see *Goodtitle v. Saville*, 15 East, 87.

(123) See *Craig v. Leslie*, 3 Wheat. 563, 577. *Postell v. Postell's Exrs.* 1 Des. 173. And where the whole beneficial interest in the land in one case, or in the money in the other, belongs to the heir, or devisee, as the case may be, a court of equity will permit him to take the money or the land, at his election, if he elect before the conversion is made. *Craig v. Leslie*, 3 Wheat. 578.

(*)if a man having a timber estate, agree to sell a given quantity per annum, to be chosen by the buyer, although the owner die, and the option is in the buyer, yet the timber cut after the owner's death, however large in quantity, will be part of his personal estate(z).

The rule established by these decisions must frequently subvert the vendor's intention; where, therefore, a vendor intends the estate, as between his real and personal representatives, to be deemed real estate, a declaration to that effect should be inserted in the agreement for sale.

Disputes also often arise between the real and personal representatives, where a person purchases an equity of redemption; the real representative mostly claiming to have the mortgage money paid off out of the personal estate, and the personal representative resisting the demand. Unless the mortgage money form part of the consideration money for the estate, or the purchaser, by communication with the mortgagee, clearly take the mortgage debt on himself, as between his heir and executor, it will be considered a charge on the land; the mere covenanting with the mortgagor to pay the debt, will not make it his personal debt; and consequently his personal estate, as between the heir and executor, will only be the auxiliary fund for payment of it(a)(124).

In cases of this nature equity always adverts to the intention of the purchaser, and disputes on this subject may therefore be prevented, by the insertion of a short declaration in the purchase-deed, 'whether the personal estate of the purchaser shall or shall not, as between his

(z) See 7 Ves. jun. 437.

(a) On this point see *Evelyn v. Evelyn*, 2 P. Wms. 659; and the cases in Mr. Cox's note; to which add, *Hamilton v. Worley*, 2 Ves. jun. 62; *Woods v. Huntingford*, 3 Ves. jun. 128; *Buller v. Buller*, 5 Ves. jun. 517; *Waring v. Ward*, 5 Ves. jun. 670; and 7 Ves. jun. 332; and *Lord Oxford v. Lady Rodney*, 14 Ves. jun. 417.

(124) *Duke of Cumberland v. Codrington*, 3 Johns. Ch. Rep. 229.
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heir and executor, be the primary fund for payment of the mortgage money.

(*)But (to return to the point under consideration) if upon the death of the vendor a title cannot be made, or there was not a perfect contract, or the Court should think the contract ought not to be executed, in all these cases there is no conversion of real estate into personal in consideration of the Court, upon which the right of the executor on the one hand, and of the heir or devisee on the other, depends; and therefore the estate will go to the heir at law of the vendor, in the same manner as if no contract had been entered into(*b*), and the heir or devisee of the purchaser will not be entitled to the money agreed to be paid for the lands, or to have any other estate bought for him(*c*). For although the purchaser himself, if alive, might elect to take the estate with the bad title(*d*), yet where he is dead the Court cannot speculate upon what he would or would not have done; but, in these cases, the inquiry must be, whether at his death a contract existed, by which he was bound, and which he would be compelled to perform. That alone can give the heir of the purchaser a right to call for the personal estate to be applied, or to the personal representative of the vendor, a right to call upon his heir. The question must be the same, whether a purchase or a sale is insisted on. Was the ancestor himself bound? Was there such an agreement as converts the real estate into personal, or the

(*b*) *Lacon v. Mertins*, 3 Atk. 1; *Attorney-general v. Day*, 1 Ves. 218; *Buckmaster v. Harrop*, 7 Ves. jun. 341; and see 8 Ves. jun. 274; *Rose v. Cunynghame*, 11 Ves. jun. 550; *Collier v. Jenkins*, 1 Yo. 295.

(*c*) *Green v. Smith*, 1 Atk. 573; *Broome v. Monck*, 10 Ves. jun. 597; *Savage v. Carrol*, 1 Ball & Beatty, 265. *Vide supra*.

(*d*) *Western v. Russell*, 3 Ves. & Bea. 187.

personal estate into real?(e)(I). On this ground it has (*)been decided, that where a man had a right of pre-emption of an estate under a will, and did not accept the offer in his life-time, or denote any intention by his will to do so, there was no subsisting contract, by virtue of which the right passed to the real representative, so as to enable him to call upon the personal estate to pay for the estate, as if it had been contracted for(f). So where upon a parol treaty, the purchaser filed his bill for a specific performance of it, and the vendor submitting to perform it, a decree was made, that the purchaser should pay the money into the bank by a given day, or the bill should be dismissed; and the purchaser paid the money according to the decree: in a question between his heir and devisee it was determined, that the estate did not pass by a general devise in his will, which was made *prior* to the payment of the money(g). It will be observed, that in this case, neither of the parties was bound at the time the bill was filed; and if the purchaser had not paid the money, his bill would have been dismissed, and, in that event, no contract would ever have existed. It was therefore clear, that the inception of the contract was upon payment of the money, and the will, therefore,

(e) *Per* Sir Wm. Grant, 7 Ves. jun. 344, 345.

(f) *Earl of Radnor v. Shafto*, 11 Ves. jun. 448.

(g) *Gaskarth v. Lord Lowther*, 12 Ves. jun. 107.

(I) *Vide supra*, p. 129. Note, in *Potter v. Potter*, 1 Ves. 438, a bill was filed to compel execution of the parol agreement in the testator's life-time; his agent gave a note for payment of part of the purchase money, and *let the estate as he pleased*. Possession of the estate must, therefore, have been delivered to him. And the Master of the Rolls expressly said, that the agreement was so far carried into execution, even before the will, as to supply the want of writing. This case, therefore, like the others, only proves, that a *binding* contract in the testator's life-time will be enforced.

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having been made *before* the contract, could not affect the estate.

But if an estate directed to be bought, but not actually contracted for, is not, or cannot be bought, yet the money must be laid out in other lands, for the benefit of the (*)devisee(*h*). And where a testator intends that the devisee of the contracted estate shall have another estate of equal value, in case a good title cannot be made to the one contracted for, an express declaration to that effect should be inserted in the will.

By this time we must have observed, that the foregoing rules, as to the conversion of the estate, apply to those cases only where a court of equity will decree a specific performance: for if equity will not interfere, and the vendee be left to his remedy at law, the rules of law, and not those of equity, must then prevail, and consequently neither the vendor nor his heir would be considered as a trustee for the purchaser, but would only be subject to an action for breach of contract.



SECTION II.

Of Specific Performance.



THE preceding observations lead us to inquire, in what cases a court of equity will decree a specific performance; which, for the purposes of this work, may be comprised under two heads. First, with respect to the vendor: Secondly, with respect to the agreement itself.

I. First, then, if a man, seised in fee-simple, or *pur*

(*h*) Whittaker v. Whittaker, 4 Bro. C. C. 31; and see 2 Atk. 369; Broome v. Monck, 10 Ves. jun. 597. *Vide supra*.

autre vie(i), contract for the sale of his estate, and die before the conveyance is executed, his heir at law will be decreed to perform the agreement *in specie*, although he covenanted for himself only, and not for his heirs(k)(125).

(*)It was a point of great controversy, whether the 7 Anne, c. 19, enabled an infant heir at law to convey in performance of a contract made by his ancestor. It is now sufficient to refer to the cases(l), for that act was repealed by the 6 Geo. 4, c. 74; but even the latter act was held not to embrace constructive trusts(m). The law now depends upon the 1 W. 4, c. 60, which enables conveyances to be made by committees of trustees and by lunatics, although not found so by inquisition, and by infant trustees; and(n) it provides that every person, being in other respects within the meaning of the act, shall be, and be deemed to be, a trustee within the act, notwithstanding he may have some beneficial estate or interest in the same subject, or may have some duty as trustee to perform. And it expressly enacts(o), that where any land shall have been contracted to be sold, and the vendor, or any of the vendors, shall have died, either having received the purchase-money for the same, or some part thereof, or not having received any part thereof, and a specific performance of such contract, either

(i) *Stevens v. Baily*, 2 Freem. 199, cited; Nels. Cha. Rep. 106 reported; see *Anon.* 2 Freem. 155.

(k) *Gell v. Vermedum*, 2 Freem. 199.

(l) See *Ex parte Vernon*, 2 P. Wms. 549; *Sikes v. Lister*, 5 Vin. Abr. 541, pl. 28; *Goodwin v. Lister*, 3 P. Wms. 387; S. C. MS.; *Hawkins v. Obeen*, 2 Ves. 559; *Fearne's Posthuma*, 236; *Jordon v. Forster*, 1 Sand. on Uses, 283, cited, 3d edit. *Ex parte Janaway*, 7 Price, 679; *Smith v. Hibbard*, 2 Dick. 730; *Oneby v. Price*, *Fearne's Post.* 239.

(m) *Dew v. Clarke*, 4 Russ. 511. *King v. Turner*, 2 Sim. 550.

(n) Sec. 15.

(o) Sec. 16.

(125) See *Glaze v. Drayton*, 1 Des. 109.

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wholly or as far as the same remains to be executed, or as far as the same by reason of the infancy can be executed, shall have been decreed by the Court of Chancery(I), in the life-time of such vendor, or after his decease, and where one person shall have purchased in the name of (*)another, but the nominal purchaser shall on the face of the conveyance appear to be the real purchaser, and there shall be no declaration of trust from him, and a decree of the Court, either before or after the death of such nominal purchaser, shall have declared him to be a trustee for the real purchaser, then in every such case the heir of such vendor, or of such nominal purchaser or his heir, in whom the premises shall be vested, shall be a trustee for the purchaser within the act.

The act then provides (*p*), that where any land shall have been contracted to be sold, and the vendor or any of the vendors shall have died, having devised the same in settlement, so as to be vested in any person for life or other limited interest, with any remainder, limitation or gift, and which may not be vested, or may be vested in some person from whom a conveyance of the same cannot be obtained, or by way of executory devise, and a specific performance of such contract, either wholly or so far as the same remained to be executed, shall have been decreed by the Court, it shall be lawful for the Court to direct such tenant for life, or other person having a limited interest, or the first executory devisee thereof, to convey the fee-simple or other the whole estate contracted to be sold to the purchaser, or in such manner as the Court shall think proper. The act is then(*q*) extended to other cases of constructive trusts, but is not to extend to

(*p*) Sec. 17.

(*q*) Sec. 18.

(I) The powers are extended to the Court of Exchequer, &c. &c. Sec. 26. 31.

a vendor, except in any case before expressly provided for.

An agreement by a man seised in tail is, of course, binding on himself, but it cannot be enforced against the issue in tail, if the entail was not effectually barred(*r*), (*)although the ancestor covenanted for that purpose(*s*), and received part, or even the whole of the purchase-money, and a decree was made against him, and he died in contempt, and in prison, for not obeying the decree(*t*) (*l*): the ground of which determinations is, that the issue in tail claim *per formam doni*, from the creator or author of the estate tail; and therefore, though in the power of tenant in tail by a particular conveyance, that not being done, the Court cannot take away the right they derive, not from the tenant in tail, but from the author of the estate tail(*u*).

A distinction has, however, been taken, where the ancestor is only equitable tenant in tail; and the Court will in that case, it is said, relieve against the issue(*v*), because equitable estates tail are mere creatures of the Court, and not within the statute *de donis*; and there certainly seems ground to contend that the Court would compel a specific performance against equitable issue in tail, where a decree has been made in the ancestor's life-time. But as late

(*r*) See 3 & 4 W. 4, c. 74, which abolished fines and recoveries, *post*. ch. 7.

(*s*) *Cavendish v. Worsley*, Hob. 203; *Ross v. Ross*, 1 Cha. Ca. 171; *Sale v. Freeland*, 2 Ventr. 350; *Jenkyns v. Keymes*, 1 Lev. 237; which have overruled the *dictum* in *Hill v. Carr*, 1 Cha. Ca. 294.

(*t*) *Powell v. Powell*, Prec. Cha. 278; *Weal v. Lower*, 2 Vern. 306, cited; *Sangon v. Williams*, Gilb. Eq. Rep. 104, cited; and see 1 Ves. 224.

(*u*) See 2 Ves. 634.

(*v*) *Norcliff v. Warsley*, 1 Cha. Ca. 234; *Sayle v. Freeland*, 2 Ventr. 350; and see 1 Pow. Contr. 126.

(*l*) But now by 1 W. 4, c. 36, s. 15, Rule 15, the Court may itself execute the decree against the tenant in tail in custody for contempt.
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authorities(*w*) had settled that an equitable estate tail in freeholds could not before the 3 & 4 W. 4, c. 74, be (*)barred by a mere deed, but only by a fine or recovery, it seems that equity could not consider such issue to be bound by a mere agreement entered into by their ancestor.

The same observations seemed to apply to legal and equitable estates tail in copyholds, for a legal entail could only before the late act have been barred according to the custom of the manor of which the copyhold estate was holden; and perhaps the better opinion was, that the same steps must have been taken to bar an equitable estate tail in copyholds, as must have been pursued in the case of a legal entail. Lord Hardwicke, however, appears to have thought(*x*) that a mere surrender was in every case sufficient to bar an *equitable* estate tail in copyholds; but the contrary opinion was entertained by the Profession, and appeared to be authorized by a case cited in several books from the papers of the late Mr. Powell(*y*), in which it was held, that a covenant by a tenant in tail in equity of a copyhold, in his marriage settlement, to surrender his copyholds to uses in strict settlement, was not of itself sufficient to dock the equitable entail; for if such an entail be created, a recovery in the court baron is necessary to dock it; *it being a rule, that the same steps must be taken to bar an equitable estate in tail, as would be requisite to bar it, were*

(*w*) *Legate v. Sewell*, 1 P. Wms. 91; *Harvey v. Parker*, 10 Vin. Abr. 266, pl. 6, affirmed in *Dom. Proc.*; *Kirkham v. Smith*, Ambl. 318; *Radford v. Wilson*, 3 Atk. 815; *Boteler v. Allington*, 1 Bro. C. C. 72; *Burnaby v. Griffin*, 3 Ves. jun. 266; and see *Fletcher v. Tollet*, 5 Ves. jun. 13.

(*x*) *Radford v. Wilson*, 3 Atk. 315; and see the judgment of Lord Chancellor Apsley, in *Grayme v. Grayme*, 1 Watk. Cop. 180; and see *Pow. Contr.* 126. See *Pullen v. Lord Middleton*, 9 Mod. 483.

(*y*) *Hale's case*, Ch. 11th Dec. 1764; and see *Roe v. Lowe*, 1 Henry Blackst. 446.

it a legal estate tail(z),(I). Indeed the power of tenants (*)in tail, to bind their issue, ought to be the same, whether the estate be freehold or copyhold, and whether the entail be legal or equitable; the analogy preserved between legal and equitable estates tail, and between limitations in freehold and copyhold estates, should be adhered to in this instance.

But now, by the 3 & 4 W. 4, c. 74, a surrender is made a sufficient bar of even a legal estate tail, and equitable tenants in tail may bar the entail either by surrender or by deed, accompanied by the solemnities required by the act(a). But in each case the provisions of the act must be complied with, or the issue will not be bound.

And it is expressly enacted, that no disposition by a tenant in tail resting only in contract, either express or implied or otherwise, and whether supported by a valuable consideration or not, shall be of any force(b).

Where by the custom of a manor, and it is the custom of most manors, a tenant is complete master of his estate, independently of his wife, and can by his own act alone bar her free bench; an agreement by him for sale of his estate will be enforced against the wife, if he die before it is carried into execution(c).

But an agreement for sale of a freehold estate could not before the late act have been carried into execution

(z) And see 1 Walk. Copyh. 181; 1 Preston on Convey. 155.

(a) Sec. 50-54.

(b) Sec. 40.

(c) Hinton v. Hinton, 2 Ves. 631, 638; Ambl. 277; Brown v. Raindle, 8 Ves. jun. 256, which overruled Musgrave v. Dashwood, 2 Vern. 45, 63.

(I) Note; this appears to be an extract from Mr. Booth's opinion on this case. The case itself appears to have been decided on the ground that the remainder-man claiming in equity under the covenant for the settlement was a mere volunteer.

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against a widow entitled to dower. The distinction was founded upon this ground ; that a husband had it in his power, during his life, to sell his copyhold estates, and thereby bar his wife's expectancy ; but if a wife's right to dower once attached on a freehold estate, no act of the husband's alone can divest it. By the late act(*d*), however, (*)a wife's dower is put altogether into the husband's power, and it is specially provided, that no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, and that all partial interests, and all charges created by any disposition of a husband, and all contracts to which his land shall be subject, shall be valid as against the right of his widow to dower.

Equity will enforce an agreement by a joint tenant for sale of his share against the survivor, if the articles amount to an equitable severance of the jointure(*e*) : and a covenant to sell, though it does not sever the joint-tenancy at law, will in equity(*f*).

An agreement by a *feme covert* for sale of her estate, cannot be enforced either at law or in equity(*g*)(126), unless the estate be settled to her separate use, so as to enable

(*d*) 3 & 4 W. 4, c. 105, s. 4, 5.

(*e*) *Musgrave v. Dashwood*, 2 Vern. 45, 63. See 2 Ves. 634.

(*f*) See 3 Ves. jun. 257 ; *Frewen v. Relfe*, 2 Bro. C. C. 220.

(*g*) *Emery v. Wase*, 5 Ves. jun. 846.

(126) See *Livingston v. Livingston*, 2 Johns. Ch. Rep. 537. A *feme covert* may mortgage her real estate for her husband's debts. *Demarest v. Wynkoop*, 3 Johns. Ch. Rep. 129. As to the power of a *feme covert* to sell or incumber her separate estate, see *Ewing v. Smith*, 3 Des. 417, 429 ; where the *English* decisions on this subject, from 1723 to 1808, are reviewed. A majority of the court considered the question as *res integra*, and that the decisions of the *English* chancery had extended the power of married women over their separate estates to a greater length than they were willing to go. See also, as to this question, *Methodist Episcopal Church v. Jaques*, 3 Johns. Ch. Rep. 77, 86. See *Dibble v. Hutton*, 1 Day, 221.

her to dispose of it as if she were sole(127); nor will an agreement by her husband bind her(*h*). Of the incapacity of a married woman, or her husband, to bind her real estate, unless [formerly] by a fine or recovery, there is a striking instance in the year books in the reign of Edward the fourth(*i*). A woman *cestui que use* and her husband joined in the sale of her estate; the wife received the money, and she and her husband begged her-feoffee to convey the estate to the purchaser, which he accordingly did. The husband died, and then the wife filed a bill against the feoffee for a breach of trust. The cause was (*)heard in the Exchequer Chamber, before the Chancellor and the judges of both benches, who held, that the sale was in fact the sale of the husband; that the receipt of the money by the wife was immaterial, and the sale was void; that the trustee was answerable for the breach of trust; and as the purchaser knew he was buying a married woman's estate, that the wife might recover the estate from him.

If, however, a husband agree to convey his wife's estate, he will, according to some cases, be compelled to perform the agreement *in specie*(*k*); because it has been

(*h*) See *Daniel v. Adams*, Ambl. 495; 1 Eq. Ca. Abr. 62, pl. 2, side note, which correct the *dictum* in *Baker v. Child*, 2 Vern. 61; but see *Martin v. Mitchell*, 3 Swanst. 413. It was said by Murray, Solicitor-General, and agreed to by Lord Hardwicke, that there was no decree in *Baker v. Child*, in Reg. Lib., but it was referred to arbitration.

(*i*) 7 E. IV. 14, b.

(*k*) *Hall v. Hardy*, 3 P. Wms. 187; *Barrington v. Horne*, 2 Eq. Ca. Abr. 17, pl. 7; *Morris v. Stephenson*, 7 Ves. jun. 474. See *Wheeler v. Newton*, Prec. Cha. 16; *Haddon's case*, Toth. 205; and see *Griffin v. Taylor*, *ib.* 106, edit. 1649.

(127) See *Jaques v. Methodist Episcopal Church*, on appeal, 17 Johns. Rep. 548. But see same case, 1 Johns. Ch. Rep. 450. and 3 Johns. Ch. Rep. 77. *Bradish v. Gibbs*, 3 Johns. Ch. Rep. 523. *Bethune v. Beresford*, 1 Des. 174.

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said, it is to be presumed that the husband, where he covenants that his wife shall levy a fine, has first gained her consent for that purpose(*l*); but this does not seem to be the true ground, for although the wife swear by her answer that she never assented to the agreement, yet the husband will not be let off(*m*). The principle upon which the Court proceeds, seems to be this, that if a person undertakes that another shall do a certain act, he is bound to procure him to perform it; and, therefore, where a father covenanted that his son, who was then under age, should convey lands to a purchaser, he was decreed to procure the son to convey on his coming of age(*n*), (*I*).

(*) There have been instances of committing the husband to the Fleet, until the wife should convey the estate; but if he should make it appear, that he could not prevail on his wife to join, it seems that he must of necessity be discharged, upon placing the vendee in the same situation as if the agreement had never been executed(*o*).

In a late case(*p*) Lord Eldon seemed to be of opinion that if this alarming doctrine were perfectly *res integra*, he should hesitate before he would hold the husband bound to procure the wife to join. His Lordship said, that if a man chooses to contract for the estate of a married

(*l*) Winter v. Devreux, 3 P. Wms. 190, n. (B).

(*m*) Withers v. Pinchard, 7 Ves. jun. 475. cited.

(*n*) Anon. 2 Cha. Ca. 53.

(*o*) See note to Hall v. Hardy, 3 P. Wms. 187; Ortreed v. Round, 4 Vin. Abr. 303, pl. 4; 8 Ves. jun. 510; and Emery v. Wase, 6 Ves. jun. 846; and see Sedgwick v. Hargrave, 2 Ves. 57.

(*p*) Emery v. Wase, 8 Ves. jun. 505; and see 16 Ves. jun. 367; Howell v. George, 1 Madd. 1.

(*I*) And it is no plea to an action at law for breach of the agreement, to say, that the third person had nothing to do with it, or no estate in it, for the defendant hath undertaken to procure it, and must at his peril.—Staughton v. Hawley, M. 1 W. and M. Rot. 662, B. R. judgment in H. after. MS.

woman, or an estate subject to dower, he knows the property is her's altogether, or to a given extent. The purchaser is bound to regard the policy of the law; and what right has he to complain, if she who, according to law, cannot part with her property but by her own free will, takes advantage of the *locus pœnitentiæ*: and why is he not to take his chance of damages against the husband? And after showing the absurdity which must arise by adhering to the contrary doctrine, his Lordship added, that there was difficulty enough to make him pause, before he should follow the two last authorities; and he was not sure, whether it was not proper to have the judgment of the House of Lords, to determine which of the decisions on this point ought to bind us.

And it now seems perfectly clear, that this jurisdiction is to be very sparingly exercised(I), and that equity will (*)eagerly seize on any reasonable ground as a bar to the aid of the Court(q). Indeed in a late case(r) in the Court of Common Pleas, where an action was brought on a covenant by a husband, that he and his wife would levy a fine, and he could not procure her concurrence, the learned Chief Justice said, that the covenant upon which the action was brought was such as the Court of Chancery would not now enforce; and he added, that nothing could be more absurd than to allow a married woman to be compelled to levy a fine, through the fear of her husband being sued and thrown into gaol, when the general principle of the law is, that a married woman shall not be

(q) See *Ortread v. Round*, 4 Vin. Abr. 203, pl. 4; *Emery v. Wase*, *ubi sup.*; *Daniel v. Adams*, Ambl. 495.

(r) *Davies v. Jones*, 1 New. Rep. 267; and see *Martin v. Mitchell*, 3 Swanst. 425.

(I) Upon this expression Lord Eldon observes, that certainly it is very satisfactory to be informed, that it is and it is not to be done. 8 Ves. jun. 516.

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compelled to levy a fine. This observation of Lord Chief Justice Mansfield must have considerable influence on this subject, although, as we have seen, it is not settled that equity will, *in every case*, refuse to compel the husband to procure his wife's concurrence.

An agreement by a lunatic cannot of course be carried into a specific execution; but the change of the condition of a person entering into an agreement by becoming lunatic, will not alter the right of the parties; which will be the same as before, provided they can come at the remedy. As if the legal estate is vested in trustees, a court of equity will decree a specific performance; and the act of God will not change the right of the parties; but where the legal estate was vested in the lunatic himself, that would formerly have prevented the remedy in equity, and left it at law(s); unless the purchaser was satisfied with the enjoyment of the estate which a decree would give him, and chose to encounter the inconvenience of leaving the legal estate outstanding in the lunatic, in (*)which case a a specific performance would have been decreed in his favor(t). But this anomaly is now removed by the 1. W. 4, c. 65(u), which provides, that where any person shall have contracted to sell an estate, and shall afterwards become lunatic, and a specific performance of such contract, either wholly or so far as the same shall remain to be performed, shall have been decreed either before or after such lunacy, it shall be lawful for the committee, by the direction of the Lord Chancellor, to convey in pursuance of such decree, and the purchase-money, or so much as remains unpaid, is to be paid to the committee.

If trustees, under a power of sale, make a legal con-

(s) *Owen v. Davies*, 1 Ves. 82.

(t) *Hall v. Warren*, 9 Ves. jun. 605.

(u) Sec. 7.

tract for sale of the estate, the contract binds the estate ; and though, by the deaths of parties, the power should be extinguished, yet the contract must be executed by those who have got an interest by the extinguishment of the power(*x*).

If an infant enter into a contract for the sale or purchase of an estate, he cannot enforce it in equity, for the remedy is not mutual(*y*).

II. Secondly, We are to consider the rules by which equity is guided in granting a specific performance, with reference to the agreement itself.

We shall, in the subsequent chapters of this treatise, have occasion to consider rather at large in what cases equity will or will not enforce a specific performance of an agreement for sale of an estate ; and it will in this (*)place, therefore, be sufficient to state the *general* rules by which equity is guided in compelling the specific performance of agreements.

The original foundation of these decrees was simply this, that damages at law would not give the party the compensation to which he was entitled ; that is, would not put him in a situation as beneficial to him as if the agreement were specifically performed. On this ground the Court, in a variety of cases, has refused to interfere, where from the nature of the case the damages must necessarily be commensurate to the injury sustained(*z*)(128),

(*x*) *Mortlock v. Buller*, 10 Ves. jun. 292 ; and see *Shannon v. Bradstreet*, 1 Scho. & Lef. 52.

(*y*) *Flight v. Bolland*, 4 Russ. 298.

(*z*) *Errington v. Annesley*, 2 Bro. C. Ca. 841 ; *Flint v. Brandon*, 8 Ves. jun. 363 ; *Mitf. Pl.* 109.

(128) See *Hepburn v. Dunlop*, 1 Wheat. 197. *Hepburn v. Auld*, 5 Cranch, 262. *Hatch v. Cobb*, 4 Johns. Ch. Rep. 559. *Kempshall v. Stone*, 5 Johns. Ch. Rep. 193. *Long v. Colston*, 1 Hen. & Munf. 110. *Perkins v. Wright*, 3 Har. & M'Hen. 326. *Colson v. Thompson*, 2 Wheat. 336.

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as, for instance, in agreements for the purchase of stock, it being the same thing to the party, where or from whom the stock is purchased, provided he receives the money that will purchase it. But the sale of an annuity payable out of dividends of a particular stock(*a*), or of the right to a dividend upon a bankrupt's estate(*b*), or even a contract for stock where the object is to obtain delivery of certificates which confer the legal title to it(*c*), may be enforced in equity. These cases show what were the grounds on which courts of equity first interfered, but they have constantly held that the party who comes into equity for a specific performance, must come with perfect propriety of conduct, otherwise they will leave him to his remedy at law(*d*).

The decreeing a specific performance is a matter of discretion, but it is not an arbitrary, capricious discretion; it must be regulated upon grounds that will make it (*)judicial(*e*)(129). And undoubtedly every agreement, of which there should be a specific execution, ought to be in writing, certain, and fair in all its parts, and for adequate consideration(*f*)(130).

(*a*) *Withy v. Cottle*, 1 Sim. & Stu. 174, affirmed upon the hearing; 1 Turn. 78.

(*b*) *Adderley v. Dixon*, 1 Sim. & Stu. 607.

(*c*) *Doloret v. Rothschild*, 1 Sim. & Stu. 590.

(*d*) *Harnett v. Yielding*, 2 Scho. & Lef. 553. [misprinted in the book] per Lord Redesdale; and see *Cadman v. Horner*, 18 Ves. jun. 10.

(*e*) Per Lord Eldon, see 7 Ves. jun. 35; and see 1 Atk. 183; 4 Burr. 2539.

(*f*) Per Lord Hardwicke, see 1 Ves. 279; and see 3 Atk. 386; *Ellard v. Lord Llandlaff*, 1 Ball & Beatty, 241; *Martin v. Mitchell*, 3 Swanst. 413; *Stanley v. Robinson*, 1 Russ. & Myl. 527.

(129) *St. John v. Benedict*, 6 Johns. Ch. Rep. 111. *Seymour v. Delancy*, 6 Johns. Ch. Rep. 222. *Perkins v. Wright*, 3 Har. & M'Hen. 326. *Orr v. Hodgson*, 4 Wheat. 465.

(130) See *Colson v. Thompson*, 2 Wheat. 336. *Clitherall v. Ogilvie*, 1 (*203)

Equity will not decree a specific performance of an agreement made in a state of intoxication, although the party was not drawn in to drink by the plaintiff; nor will it decree the agreement to be delivered up; but will leave the parties to their remedy at law(*g*)(131).

If it be stipulated in a contract, that immediate possession shall be given to the purchaser, which is done, but in consequence of disputes as to the title, the seller afterwards turn the purchaser out of possession, he abandons his right to a specific performance(*h*).

A court of equity frequently decrees a specific performance where the action at law has been lost by the default of the very party seeking the specific performance, if it be notwithstanding conscientious that that agreement should be performed, as in cases where the terms of the agreement have not been strictly performed on the part of the person seeking specific performance; and to sustain an action at law, performance must be averred according to the very terms of the contract. Nothing but specific execution of the contract, so far as it can be executed, will do justice in such a case(*i*).

Although damages may be recovered at law, yet equity (*) is not therefore obliged to decree a specific performance;

(*g*) *Cragg v. Holme*, 18 Ves. jun. 14, cited. See *Say v. Barwick*, 1 Ves. & Bea. 95.

(*h*) *Knatchbull v. Grueber*, 3 Mer. 124.

(*i*) *Davis v. Hone*, 2 Scho. & Lef. 341, 748. See *Lennon v. Napper*, *ibid.* 684.

Des. 250, 257. *Caldwell v. Myers*, Hardin, 553. *Carberry v. Tannehill*, 1 Har. & Johns, 224. *Seymour v. Delancy*, 6 Johns. Ch. Rep. 222.

(131) See *contra*, *Wigglesworth v. Steers*, 1 Hen. & Munf. 70. As to the validity of contracts made by persons in a state of intoxication, see *Rutherford v. Ruff*, 4 Des. 350. *Wade v. Colvert*, 2 Rep. Con. Ct. 27. *Campbell v. Ketcham*, 1 Bibb. 406. *Taylor v. Patrick*, 1 Bibb. 168. *White v. Cox*, 3 Hayw. 82.

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but the Court will judge on the whole circumstances of the case, whether it be such an agreement as ought to be carried into effect ; for a jury, upon inquiry, may find very small damages, and then it would be very hard to carry such an agreement into execution in equity, when it would be greatly to the prejudice of the party against whom it should be decreed to be executed(*k*)(132).

In a case where a man was entitled to a small estate under his father's will, given on condition that if he should sell it in twenty-five years, half the purchase-money should go to his brother ; he agreed, in writing, to sell it, and afterwards refused to carry the sale into execution, pretending to have been intoxicated at the time. A bill was brought against him to compel a specific performance ; and Lord Hardwicke held, that without the other circumstance, the hardship alone of losing half the purchase-money, if carried into execution, was sufficient to determine the discretion of the Court not to interfere, but leave them to law(*l*)(133).

Nor will equity interpose, if the party who is called upon to do the act is not lawfully competent to do it ; for that, amongst other inconveniences, would expose him to a new action for damages(*m*)(134).

(*k*) *Per* Lord Hardwicke, MS. See *Pope v. Harris*, Lofft, 791, cited ; *White's case*, 3 Swanst. 108, n.

(*l*) *Fain v. Brown*, 2 Ves. 307, cited ; *Costigan v. Hastler*, 2 Scho. & Lef. 160. See 2 Ball & Beatty, 283 ; *Howell v. George*, 1 Madd. 1.

(*m*) *Harnett v. Yielding*, 2 Scho. & Lef. 554 ; *Ellard v. Lord Llandaff*, 1 Ball & Beatty, 241. See *post*, p. 210.

(132) See *Perkins v. Wright*, 2 Har. & M'Hen. 326. *Clitherall v. Ogilvie*, 1 Des. 263. *Edwards v. Handley*, Hardin, 602. See *Campbell v. Spencer*, 2 Binn. 129.

(133) See *Rugge v. Ellis*, 1 Des. 160, 163.

(134) A court of Equity will not enforce an agreement entered into in fraud of, or against the policy of the law. *M'Dermid v. M'Castland*, Hardin, 18. *Hannay v. Eve*, 3 Cranch, 242. It seems, that the alien-

But although a covenant ought not to be performed literally, yet equity will execute it according to a conscientious modification of it, to do justice as far as circumstances will permit(*n*)(135).

(*)*Suppressio veri*, as well as *suggestio falsi*, is a ground to rescind an agreement, or at least not to carry it into execution(*o*), and even an industrious concealment, during a treaty, of the necessary repair of a wall to protect the estate from a river, which was a considerable outgoing, has been deemed a sufficient ground to withhold the aid of equity from a vendor(*p*). So where there is a mistake between the parties as to what was sold, the Court will not interfere in favor of either party(*q*). Even mere surprise on third persons at a sale by auction, has been deemed sufficient to prevent the Court from assisting a purchaser, as where the known agent of the seller bid for the estate on behalf of the purchaser, and other persons present thinking he was bidding as a puffer on the part of the vendor were deterred from bidding(*r*),

(*n*) *Davis v. Hone*, 2 Scho. & Lef. 348.

(*o*) See *Buxton v. Cooper*, 3 Atk. 383; S. C. MS.; *Howard v. Hopkins*, 2 Atk. 371; *Young v. Clerk*, Prec. Cha. 138; 1 Trea. Eq. ch. ii. s. 8; 1 Ball & Beatty, 241; *Lord Clermont v. Tasburgh*, 1 Jac. & Walk. 112.

(*p*) *Shirley v. Stratton*, 1 Bro. C. C. 410. See *Small v. Attwood*, *Younge's Rep.*

(*q*) See 1 Ves. jun. 211; 6 Ves. jun. 339; 13 Ves. jun. 427; *Higginson v. Clowes*, 15 Ves. jun. 156; *Clowes v. Higginson*, 1 Ves. & Bea. 524; *Harnett v. Yielding*, 2 Scho. & Lef. 554.

(*r*) *Twining v. Morris*, 2 Bro. C. C. 326. See 6 Ves. jun. 338; 10 Ves. jun. 305, 313, 398; and see *Willan v. Willan*, 16 Ves. jun. 72; *Magrave v. Archbold*, 1 Dow, 107.

age of the vendee may afford a sufficient reason for refusing a specific performance of a contract for the sale of lands, as against him. *Hepburn v. Dunlop*, 1 Wheat. 179.

(135) See *Champion v. Brown*, 6 Johns. Ch. Rep. 398. *Ramsay v. Brailsford*, 2 Des. 583.

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So, in a recent case, where a purchaser, previously to the sale by auction, told the vendor that he would have nothing to do with the estate, but afterwards went to the sale, *where he was considered by the company as a puffer*(I) and bid 8,000*l.* for the estate, which was knocked down to him at that sum from the misapprehension of the person appointed to bid for the vendor, who ought to have (*)bid 9,000*l.*, and the mistake was instantly explained, a specific performance was refused(s)(136).

(s) *Mason v. Armitage*, 13 Ves. jun. 25. See *Hill v. Buckley*, 17 Ves. jun. 394.

(I) This is stated in the judgment, but *qu.* whether it appeared in evidence.

(136) No concealment or misrepresentation can have the effect of barring the rights of the parties to a contract, unless it be collusive or fraudulent, or the negligence be so gross as to amount to proof of fraud. *Stuart v. Luddington*, 1 Rand. 403. See further as to concealment and misrepresentation; *M'Allister v. Barry*, 2 Hayw. 290. *Thigpen v. Balfour*, 1 Car. Law Rep. 112. *Kennedy v. Johnson*, 2 Bibb, 12. In *Bowman v. Bates*, 2 Bibb, 47, 52, it was held by a majority of the court, that where the vendee of land, having discovered salt water, industriously and artfully concealed the fact from the vendor, equity would relieve against the contract of sale. See *Armstrong v. Hickman*, 6 Munf. 287.

In the case of *Rothschild v. Brookman*, 5 Blight. 165, where a holder of foreign stock buys and sells with the advice of his broker, and through him, but the broker in fact never purchases any stock, but being a holder of such stock himself the transactions are all nominal, and no transfers are made. After a loss on these transactions and a settlement of account, upon which the principal, who was ignorant that the transactions were nominal, pays a sum of money to the agent, upon a bill filed four years after the settlement, the transactions set aside, and the money paid ordered to be refunded, and the decree of the court of Chancery affirmed with costs.

"In sound policy no person ought, in any case, to be employed secretly to bid for the owner against the *bona fide* bidder, at a public auction. It is fraud in law on the very face of the transaction, and the owner's interference and right to bid, in order to be admissible, ought to be in-

If an agent, employed to sell an estate, sells it in a manner not authorized by the authority given to him, a specific performance will not be decreed against the principal although the estate be sold for a greater price than he required for it(*t*). At least, it is clearly settled, that if an agent is empowered to sell an estate by public auction, a sale by private contract is not within his authority. For although the owner may have fixed the price, yet the estate might have sold for more at a public auction. But if an agent is directed to sell an estate by private contract, and he dispose of it by public auction for a larger sum than the principal required, it still seems open to contend that the purchaser may enforce a specific performance of the contract, unless some particular reason should occur to induce the Court to refuse its aid.

In *Mortlock v. Buller*(*u*), Lord Eldon said he should hesitate long before he should state as a clear proposition, that where the title to a specific performance is founded in a gross breach of trust by an agent to his principal, a court of equity would assist the plaintiff in the purpose of availing himself of that breach of trust; and whether the principle would not authorize the Court to leave him to law, and not to let him come for a remedy beyond that. There were, his Lordship added, *dicta* enough well to authorize that.

And where trustees for sale of an estate enter into a contract, which would be deemed a breach of trust,

(*t*) *Daniel v. Adams*, Ambl. 495; *et vide* a *dictum* by Lord Eldon in *Coles v. Trecothick*, 1 Smith's Rep. 247.

(*u*) 10 Ves. jun. 292; and see the close of the judgment, *Ord v. Noel*, 5 Madd. 438.

timated on the conditions of sale; and such a doctrine is understood to have been recently declared at Westminster Hall." 2 K. Com. 536.

In *Mills v. Goodsell*, 5 Conn. R. 475, the point decided was, that an officer who sells property on execution, cannot become a purchaser without the consent of both debtor and creditor.

"(*)equity will not only refuse to interfere in favor of the purchaser, but will even at the suit of the *cestuis que trust* restrain the trustees from executing the contract, and the purchaser will be left to his remedy at law(*x*).

If a person, entitled in default of execution of a power of sale, contract to sell the estate, not as owner, but merely as the agent of the trustees, and the contract could not, under the circumstances, have been carried into execution against the trustees, it will not be enforced against the agent, although he himself become entitled to the estate before the decree(*y*),(*I*).

Where a person takes upon himself to contract for the sale of an estate, and is not absolute owner of it, nor has it in his power by the ordinary course of law or equity to make himself so; though the owner offer to make the seller a title, yet equity will not force the buyer to take it, for every seller ought to be a *bona fide* contractor(*z*): and it would lead to infinite mischief if one man were permitted to speculate upon the sale of another's estate. Besides, the (*)remedy is not mutual, which perhaps is of itself a suffi-

(*x*) *Mortlock v. Buller*, 10 Ves. jun. 292. See *Hill v. Buckley*, 17 Ves. jun. 394; *Bridger v. Rice*, 1 Jac. & Walk. 74.

(*y*) *Mortlock v. Buller*, 10 Ves. jun. 292.

(*z*) *Tendring v. London*, 2 Eq. Ca. Abr. 680, pl. 9. See 10 Ves. jun. 315; and 1 Jac. & Walk. 421; and *query*, whether there is *any* case, in which a man, knowing himself not to have any title, has been allowed to enforce the contract by procuring a title before the report.

(*I*) From the papers in this cause, it seems that Mr. Buller treated with Mr. Mortlock as the owner of the estate, and this appeared from the receipt for the purchase-money, where the estate was called, "the property of John Buller, Esq." and Mr. Mortlock had not any knowledge whatever that the estate was in settlement. See *Lawrenson v. Butler*, 1 Sch. & Lef. 13.

Since this note was written, an action brought by Mr. Mortlock against Mr. Buller, for breach of contract, came on for trial, when it was compromised on terms very advantageous to the plaintiff. See 2 Ball & Beatty, 60; and see 2 Dow, 518.

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cient objection in a case of this nature. In *Armiger v. Clarke*(a), a tenant for life contracted to sell the inheritance : after his death, his son, who was entitled to the estate in remainder, and was not bound by his father's covenant, brought a bill for a specific performance against the purchaser, and it was dismissed chiefly upon this principle, that the remedy was not mutual(137). And in *Noel v. Hoy*(b), it was said, that if *A.* sells *B.*'s estate, although *B.* is willing to confirm the contract, *A.* cannot enforce it : there is no mutuality. So an infant cannot specifically enforce a contract by himself for sale, because there is no mutuality(c). But in *Williams v. Carter*(d), the estate was sold, and it was afterwards discovered that it was bound by marriage articles, which it was decided in a suit instituted for the purpose, authorized the introduction of a power of sale in the trustees, and thereupon a bill was filed by them and the seller for a specific performance. The Vice-Chancellor overruled the objection, that there was no mutuality in the agreement, and decreed a specific performance.

And on the other hand, where a *bona fide* vendor has not a title to the estate, the Court will not, in favor of the purchaser, decree an impossibility, but will leave the purchaser to his remedy at law upon the articles(e); and, although he must necessarily obtain a verdict, if he have recourse to law, yet he would in most cases obtain nominal damages only(f), for a purchaser, as a general rule, is

(a) Bunb. 111; see *post*, ch. 6; *Hamilton v. Grant*, 3 Dow, 33.

(b) V. C. 23 Feb. 1820, MS.

(c) *Flight v. Bolland*, 4 Russ. 298.

(d) MS. V. C. 1821.

(e) *Crop v. Norton*, 2 Atk. 74; 9 Mod. 233; *Cornwall v. Williams*, Colles, P. C. 390; *Benet College v. Carey*, 3 Bro. C. C. 390.

(f) *Fleureau v. Thornhill*, 2 Blackst. 1078; and see 3 Bos. & Pull. 167. See *Brig's case*, Palm. 364. *Vide post*.

(137) See *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. Rep. 273, 282. *Benedict v. Lynch*, 1 Johns. Ch. Rep. 370.

(*)not entitled to any compensation for the fancied goodness of his bargain, which he may suppose he has lost(138).

But where the purchaser is willing to take the title, such as it is, it is apprehended that he may do so. In a late case(g)(139), Lord Redesdale said, that the plaintiff in equity must show that in seeking the performance, he does not call upon the other party to do an act which he is not lawfully competent to do; for, if he does, a consequence is produced that quite passes by the object of the Court in exercising the jurisdiction, which is to do more complete justice. If a party is compelled to do an act which he is not lawfully authorized to do, he is exposed to a new action for damages, at the suit of the person injured by such act; and, therefore, if a bill is filed for a specific performance of an agreement made by a man who appears to have a bad title, he is not compellable to execute it, unless the party seeking performance is willing to accept such a title as he can give, and that only in case where an injury would be sustained by the party plaintiff, in case he were not to get such an execution of the agreement as the defendant can give. His Lordship took the reason to be this, among others, not only that it is laying the foundation of an action at law, in which damages may be recovered against the party, but also that it is by possibility injuring a third person, by creating a title with which he may have to contend.

It is, however, the received opinion, that the purchaser may elect to take the title, such as it is, although no injury would be sustained by him in case the agreement

(g) *Harnett v. Yielding*, 2 Scho. & Lef. 549. See *post*.

(138) See *Hepburn v. Dunlop*, 1 Wheat. 179. *Hepburn v. Auld*, 5 Cranch, 262. *Butler v. O'Hear*, 1 Des. 382. *Fisher v. Kay*, 2 Bibb, 434. *Johnson v. Hobson*, 1 Lit. 314. *Kelley v. Bradford*, 3 Bibb, 317. As to damages in case of eviction by title paramount, see *Cooper's Justinian*, 607 to 620, where the American cases on that subject are collected.

(139) See *Roach v. Rutherford*, 4 Des. 126.

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were not executed, nor does the rule seem to lead to the difficulty which has been apprehended; for, in such a case, the covenants must, of course, be so framed, as not to leave the seller exposed to an action on account of the (*)flaw in the title; but where the conveyance would be merely void, and might embarrass persons claiming under the same title as the seller, equity seems to refuse its aid on substantial grounds(*h*).

But where a tenant for life with a power of sale, first settling other estates of equal or better value, sold the estate under an apprehension that he had power to convey the fee, the Court refused to compel him to settle another estate, in order to enable him to complete his contract(*i*).

To enable the Court to decree a specific performance against a vendor, it is not, however, necessary that he should have the legal estate; for if he has an equitable title, a performance in specie will be decreed(*k*), and he must obtain the concurrence of the persons seised of the legal estate.

Although, as we have seen, a vendor cannot demand the aid of equity, unless he is a *bona fide* contractor, yet the circumstance that the purchaser is a nominal contractor, and purchases in trust for another person, is immaterial; for it happens, in a vast proportion of cases, that the contract is entered into in the name of a trustee(*l*), and the mere fact of a quarrel having taken place between the vendor and the real purchaser, totally unconnected with the subject of the contract(*m*), or even a bare

(*h*) See *Ellard v. Lord Llandaff*, 1 Ball & Beatty, 244. See *O'Rourke v. Percival*, 2 Ball & Beatty, 56.

(*i*) *Howell v. George*, 1 Madd. 1.

(*k*) *Crop v. Norton*, 2 Atk. 74. See *Costigan v. Hastler*, 2 Scho. & Lef. 160.

(*l*) *Hall v. Warren*, 9 Ves. jun. 605.

(*m*) S. C.

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refusal by the vendor to deal with the real contractor(*n*), is not a sufficient ground to refuse a performance in specie of the agreement.

But if a person apply to purchase an estate, and the (*)vendor expressly refuse to treat with him, unless the money is paid down, which he is unable to do, but procures some other person to purchase the estate on his account, it seems clear, that at least the time appointed for payment of the money will be deemed of the very essence of the contract(*o*). So if a person apply to purchase an estate on behalf of *A.*, for whom the vendor has a great value or affection, and the vendor is induced to take less for the estate than he otherwise would have done; or even, perhaps, without this circumstance, the agreement cannot be enforced against the vendor, if it be made on behalf of any other person than *A.*; but if *A.* will patronize the sale, execution of the agreement must be compelled, although he may sell the estate the next day to the fraudulent purchaser(*p*).

The case of *Scott v. Langstaffe*(*q*), was decided on the same principle. A purchaser of a house adjoining to a house occupied by the vendor, agreed with the vendor, though it was not made part of the written contract, that he would not lease the house to any person not agreeable to him. Langstaffe applied for a lease, and stated that he knew the vendor intimately, and that there

(*n*) *Lord Irnham v. Child*, 1 Bro. C. C. 92.

(*o*) *Popham v. Eyre*, Lofft, 786. Mr. Brown's note of this case evinces the danger of relying on short notes of cases; see 1 Bro. C. C. 95, n. See *O'Herlihy v. Hedges*, 1 Schoales & Lefroy's Rep. 123; but note, that case was between *landlord and tenant*; and see *Featherstonhaugh v. Fenwick*, 17 Ves. jun. 298.

(*p*) *Philips v. Duke of Buckingham*, 1 Vern. 227. In Mr. Raithby's edit. it is said that a specific performance was decreed. The principle, however, is now well established.

(*q*) Lofft, 797, 798, cited; and see *Bonnett v. Sadler*, 14 Ves. jun. 527; *Fellowes v. Lord Gwydyr*, 1 Sim. 63.

would be no objection to grant him a lease. The vendor, however, disapproved of Langstaffe, and, so far from knowing him intimately, had only seen him at a tavern. Lord Camden said, this was the case of *Philips v. the (*)Duke of Buckingham*. Nobody, who had read that case, could easily forget it. And his Lordship set aside the agreement which Langstaffe had obtained, with costs.

A similar case is mentioned in Hawkins's life of Johnson, which was also decided on the authority of Philips's case. Peele the bookseller had a house near Garrick's at Hampton. Peele had often said, that as he knew it would be an accommodation to Garrick, he had given directions that at his decease he should have the refusal of it. On Peele's death, a man in the neighborhood applied to his executors, pretending that he had a commission from a friend or relation of Peele's, who lived in the country, to buy the house at any price, and he accordingly obtained a conveyance of it to a person nominated by him under a secret trust for himself. Garrick filed a bill against him, and the purchase was decreed fraudulent, and set aside with costs.

But although a seller falsely assume the character of an agent to another, when he is himself the real seller, and the purchaser be deceived by the representation, yet it has been decided that if the purchaser cannot prove damage, or that the misrepresentation induced him to enter into the contract, a specific performance will not be refused(*r*).

An agreement for the sale of an annuity for three lives, to be named by the purchaser, and to commence immediately, will be decreed, although the lives have not been named, if the delay has been occasioned by the seller(*s*).

(*r*) *Fellowes v. Lord Gwydyr*, 1 Sim. 63 ; 1 Russ. & Myl. 83.

(*s*) *Pritchard v. Ovey*, 1 Jac. & Walk. 396.

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In some cases(*t*), it has been holden, that where no (*)action at law will lie to recover damages, equity will not execute the agreement in *specie*; for equity will never make that a good agreement, which is not so by law; but, in other cases(*u*), the contrary has been holden, and relief been given accordingly.

Perhaps the following distinctions are authorized by the cases, and will reconcile them.

First, That although the agreement be void at law, yet a specific performance will be decreed, if there is a clear ground for the interference of equity, according to the general rules of the Court; and, however unqualifiedly the contrary rule may have been laid down, there is not (that I am aware of) any case clearly entitled to the aid of the Court, to which this rule has been successfully opposed as a bar to the relief.

Thus a bond from a woman to her intended husband has been enforced in equity, although void at law by the intermarriage; and an agreement for sale of an estate has been decreed against an heir at law, although his ancestor died before the time appointed to convey the estate, and therefore no action would lie against him. In the first of these cases the impropriety of the security was deemed immaterial; for it was sufficient that the bond was a written evidence of the agreement of the parties, and the agreement being upon a valuable consideration, ought to be executed in equity. The decision in the other case depended upon the doctrine, that the

(*t*) *The Marquis of Normanby v. Duke of Devonshire*, 2 Freem. 216; *Dr. Betesworth v. Dean and Chapter of St. Paul's*, Sel. Cha. Ca. 66; and see 2 Eq. Ca. Abr. 15, 23, *notis*; and Fonbl. n. (*c*) to 1 Trea. Eq. 138, and n. (*h*) to p. 204, *ibid.*

(*u*) *Winged v. Lefebury*, 2 Eq. Ca. Abr. 32, pl. 43; *Acton v. Pierce*, 2 Vern. 480; *Cannel v. Buckle*, 2 P. Wms. 243; *Norton v. Mascall*, 2 Vern. 24; and *Hall v. Hardy*, 3 P. Wms. 187. See *East India Company v. Donald*, 9 Ves. jun. 275; 1 Smith's Rep. 213.

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t (y) See Hollis v. Edwards, 1 Vern. 159.

(140) See *Hollingsworth v. Fry*, 4 Dall. 345, 347.

Tha tan opinion formerly prevailed, that on a suit for the specific execution of a parol agreement for the sale of land, the defendant must either confess or deny the agreement, and, that in the former case, the plea of the statute of frauds would be unavailing, is not less true than strange. But it is now the settled rule of the court, that although the defendant should answer and admit the agreement as stated in the bill, he may nevertheless protect himself against a performance, by pleading the statute. And it was held in *Thompson v. Tod*, 1 Pet. C. C. R. 880, that part performance of the contract can have no other effect than to let the plaintiff in to prove the contract *aliunde*, where it is not confessed; but in the case then before the court no such proof was given; the contract being neither admitted nor proved: held, that the plaintiff was not entitled to the relief which he specifically prayed for. Washington, J. added, that although it should be admitted, that under all the circumstances of that case, that the payment of a part of the purchase money will amount to a part performance, still it should appear, beyond all reasonable doubt, that the payment was understood by the parties to have been so made and intended.

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court of law, unless in the case of fraud, interposes and relieves against the rigor of the law.

quis of Normanby v. the Duke of , the first in which this point a manuscript note, it appears two chief justices on the letters which had passed, law? They were of Somers accordingly

cases in which a court of equity performance of an agreement upon which be no action at law, according to the words of articles, and the events that have happened(z).

A proviso, in a contract for sale, that if either party (*)break the agreement he shall pay a sum of money to the other, will only be considered in the nature of a penalty(a); and consequently a specific performance will be decreed just as if no such proviso had been inserted. The defendant will not be allowed to forfeit the penalty, and get rid of the agreement(b)(141).

Where an action is brought for the recovery of the penalty, to entitle the party bringing it to recover, he ought punctually, exactly, and literally, to have completed his part(c). And, it has been said, that if, for

(z) *Whitmel v. Farrel*, 1 Ves. 256.

(a) *Howard v. Hopkins*, 2 Atk. 371. See 2 Scho. & Lef. 684; and *Margrave v. Archbold*, 1 Dow, 107; *Davies v. Penton*, 6 Barn. & Cress 216; 9 Dowl. & R. 369, S. C.

(b) *Hopson v. Trevor*, 1 Str. 533; 2 P. Wms. 191; *Parks v. Wilson*, 10 Mod. 515.

(c) *Duke of St. Alban's v. Shore*, 1 H. Blackst. 270.

(141) See *Telfair v. Telfair*, 2 Des. 271. *Telfair v. Telfair*, ut supra.

breach of an agreement, to which a penalty was annexed, either party recover damages at law beyond the penalty, equity will relieve against the verdict, on payment of the penalty only(*d*) ; but this is not well founded, for, if the party have two remedies at law, one for breach of contract upon the covenant, or agreement, *toties quoties*; the other for the penalty at once(*e*), there appears to be no pretence for equity to relieve ; although where large damages have been recovered at law, under a covenant which it was unconscientious strictly to enforce, the party may be relieved in equity, upon offering to perform the covenant according to conscience : but even this seems, in some measure, to be usurping the province of a jury, and the equity is administered with great caution(142).

Where the parties have expressly stipulated, that in case of a breach by either, he shall pay a sum named as *liquidated* (*)*damages*, the whole sum may, if the agreement be broken, be recovered at law(*f*)(143).

If a power be given in a contract to a purchaser to leave the purchase-money as a charge upon the property for a given period at interest, and it be stipulated that the purchaser shall be deemed a tenant to the seller at a rent equal to the interest, and the seller have power to distrain ; though the agreement be acted upon, yet the instrument would not be deemed a lease, but is substantially a contract for purchase, and the power of distress does not alter the nature of the contract between the par-

(*d*) *Shenton v. Jordan*, Bunb. 132 ; but the reporter adds a *query*, for this seems an extraordinary opinion.

(*e*) See *Harrison v. Wright*, 13 East, 343.

(*f*) *Reilly v. Jones*, 1 Bing. 302 ; 8 Moo. 244, S. C.

(142) See *Skinner v. Dayton*, 2 Johns. Ch. Rep. 526. *Graham v. Bickham*, 4 Dall. 149.

(143) See *Slosson v. Beadle*, 7 Johns. Rep. 72. *Hasbrouck v. Tappen*, 15 Johns. Rep. 200.

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ties. And this construction would be applied in the event of the bankruptcy of the purchaser(*g*).



SECTION III.

Of the Remedies for a Breach of Contract.



If either the vendor or vendee refuse to perform the contract, the other may bring an action for breach of contract, or file a bill for a specific performance(*h*); although it appears to have been formerly thought that as a vendor only wants the purchase-money, his remedy was at law(*i*).

Where one party fails in performing the contract, the other, if he means to rescind the contract, should give a clear notice of his intention(*k*).

If a bill be filed for a specific performance, the Court (*) will enjoin either party not to do any act to the injury of the other. Therefore, if the purchaser is in possession, and has not paid the money, the Court will grant an injunction against his cutting timber(*l*)(144); so, on the oth-

(*g*) *Hope v. Booth*, 1 Barn. & Adolp. 498.

(*h*) *Lewis v. Lord Lechmere*, 10 Mod. 503.

(*i*) See *Armiger v. Clark*, Bunb. 111; *Withy v. Cottle*, 1 Sim. & Stu. 174. See *Kenney v. Wenham*, 6 Madd. 315.

(*k*) *Reynolds v. Nelson*, 6 Madd. 18.

(*l*) *Crockford v. Alexander*, 15 Ves. jun. 138.

(144) An injunction to stay waste will not be granted against a vendee, to whom land has been sold in fee, even where the vendor retains the title as security for the purchase money; unless he brings his suit to enforce the lien, alleging, that the defendant is committing waste in such a manner as to render the land an incompetent security; in which case, an
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er hand, the vendor will be restrained from conveying away the legal estate in the property ; because such a measure might put the purchaser to the expense of making another party to the suit(*m*) ; and, *a fortiori*, he will be restrained from selling the estate to a third person(*n*). But in *Spiller v. Spiller*(*o*), the Lord Chancellor expressly laid it down, that upon a bill filed for a specific performance, he wished it to be understood, that the Court would not take from a seller the disposition of his property. So injunctions may be granted against the agents of the parties. But an injunction will not be granted against a person who is not a party to the suit ; and, in a late case, in which, upon a bill filed by a seller for a specific performance, and an injunction against the purchaser's proceeding at law to recover the deposit from the seller's attorney, to whom it was paid, Sir John Leach, V. C. refused the motion, with costs, because the attorney was not a party to the suit(*p*). But in a very recent case, the same Judge granted an injunction to restrain the purchaser from proceeding in an action against the auctioneer, although he (the auctioneer) was not a party to the suit ; the seller offering to bring the deposit into Court.

In all cases where a bill in equity is filed for a specific

(*m*) *Echliff v. Baldwin*, 1 Ves. jun. 267.

(*n*) *Curtis v. Marquis of Buckingham*, 3 Ves. & Beam. 168.

(*o*) 30 June 1819, MS. S. C. 3 Swanst. 556.

(*p*) *Brown v. Frost*, E. T. 1818. MS.

injunction to stay waste, *pending the suit*, may be awarded. *Scott v. Wharton*, 2 Hen. & Munf. 25. An injunction will lie against a mortgagor in possession, to stay waste ; although no suit be pending for foreclosure. *Brady v. Waldron*, 2 Johns. Ch. Rep. 148. So, an injunction will lie to restrain the defendant from cutting timber and committing other waste, he being in possession, claiming title adversely, a suit being pending, at law, to try the title. *Shubrick v. Guerard*, 2 Des. 616. See contra, *Storm v. Mann*, 4 Johns. Ch. Rep. 21.

performance, either party may in general, if he please, have a reference as to the title. The vendor is entitled to (*)this privilege in order to enable him to make out a title before a Master. The purchaser is allowed this right, in order that he may have the title assured in a manner he otherwise could not. As to a purchaser, the Court never acts upon the fact, that a satisfactory abstract was delivered, unless the party has clearly bound himself to accept the title upon the abstract; but though the abstract is in the hands of the party who says he cannot object to it, yet he may insist upon a reference; because, by the production of papers, which can be enforced, and by the examinations and inquiries which can be made by virtue of the decree, the title may be examined in a manner it never could upon a mere abstract(*q*)(145). Either party may, however, wave this right.

Where a man makes a purchase of an estate, to which the vendor represents that he has a good title, in such a case the purchaser has a right to insist, that the question whether he have or have not a good title shall be sifted to the bottom before he can be called upon to adopt either alternative, and before the vendor can be let off from his original contract(*r*).

Where the purchaser files the bill, and insists that the vendor *cannot* make good a title, equity can only dismiss the bill with costs, although the Court will compel him to make out the title if he have the ability(*s*). But the Court has power in a suit so framed to decide whether the title is good or bad.

If, after the confirmation of a report in favor of a title,

(*q*) See Lord Eldon's judgment in *Jenkins v. Hiles*, 6 Ves. jun. 653.

(*r*) 3 Mer. 137, *per* Lord Eldon.

(*s*) *Nicloson v. Wordsworth*, 2 Swanst. 365.

(145) See *Beverley v. Lawson's heirs*, 3 Munf. 317, 383. *M'Comb v. Wright*, 4 Johns. Ch. Rep. 659.

a new fact appear, by which the title is affected, the title will be referred back to the Master(*t*). In a case where the seller of a leasehold estate produced the leasehold title, (*)which the Master thought sufficient, and reported accordingly ; but the Court held, that the lessor's title ought to have been produced, and sent it back to the Master to review his report ; the seller had liberty given to him to produce the freehold title. And it was considered that the purchaser was at liberty to enter into objections to the leasehold title, which were not taken upon the former discussions before the Master(*u*). And, upon the objections being afterwards taken, the bill was dismissed(*x*). The course of the Court is, where the Master has, by expressing an opinion in favor of the title, prevented the vendor from showing, that if his opinion had been otherwise, still the title was good, to send it back to the Master to review his report, the party moving to pay the costs of the motion(*y*). If the Master's report in favor of the title be overruled, yet the seller may, upon an early application, obtain a reference back, in order to show that the title is valid upon another ground not before taken(*z*).

So where it appears at the hearing upon the exceptions, that the seller can clear up the objection, the Court has sometimes sent the title back to the Master to review his report, and in such a case it is not necessary, as it was held by Lord Eldon, that the Master should have liberty to receive further evidence. He may receive such evidence without any express authority. In the case of

(*t*) *Jeudwine v. Alcock*, 1 Mad. 597.

(*u*) *Fildes v. Hooker*, 2 Mer. 424. *Andrew v. Andrew*, 3 Sim. 390.

(*x*) S. C. V. C. 3d April 1818, MS ; 3 Madd. 193.

(*y*) *Egerton v. Jones*, 3 Sim. 392.

(*z*) *Egerton v. Jones*, 1 Russ. & Myl. 694. *Portman v. Mill*, *ib.* 697.

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Esdaile v. Stephenson(a), it appeared that the estate was subject to a rent-charge, and a term to secure it; and (*)the purchaser's counsel, before the Master, required the seller to produce a release of it, or evidence that the jointress would release; but although he did not do so, the Master reported, that the seller could make a good title upon the jointress releasing. To this report exceptions were taken. The Vice-Chancellor consulted the Lord Chancellor, and stated their opinion to be, that the report was wrong. It should have been, that the seller could not make a good title unless the jointress joined; and the Vice-Chancellor recommended in future, the form of such a report to be, that the seller could *not* make a good title, because *A.* is a jointress, and no sufficient evidence has been produced to show that she will release. The Lord Chancellor and the Vice-Chancellor agreed, that if a title upon a new fact can be made between the report and the further directions, the Court will enforce the contract, as if in the above case the jointress had agreed to join when the cause came on for further directions: In such a case the Court would expect counsel to appear, and consent that she would concur. This points out the necessity in such cases of setting down the cause upon further directions at the same time with the exceptions. In *Esdaile v. Stephenson*, as the exceptions only were before the Court, they were ordered to stand over, with liberty to set down the cause for further directions, and then the exceptions and further directions to come on together. It was in the above case expressly laid down, that the Court would not allow a seller to lie by before the Master, and then upon further directions attempt to make a title. There was an appeal from this decision, but it has since been withdrawn.

(a) V. C. 8 Aug. 1822. MS. S. C. 6 Madd. 366; *Paton v. Rogers*, 6 Madd. 256.

If exceptions are taken to the report, that a good title can be made, and are overruled, other objections to the title cannot be made ; but if exceptions are allowed, and (*)a new abstract of title is delivered, further objections may of course be brought in(*b*).

In *Noel v. Hoy*(*c*), the seller rested his title on the construction of a will, by which he insisted the estate did not pass. The point was decided against him, and then he asked for a reference to the Master, to see whether he could make a good title, as he insisted that the devisees were trustees for him. This reference was objected to by the purchaser. The Court said, that it should have great difficulty in allowing the plaintiff after a decree to amend his bill, by bringing new parties before the Court. But time had been allowed to get an act of parliament. If the Master was of opinion that the devisees were trustees for the seller, he would report in favor of the title. If a suit should be necessary to try their equity, he would report against it.

A purchaser may file a bill for a specific performance, although it appears by the abstract that the vendor has no title, and yet unless he chooses to take the title, the Court cannot force it upon him, on the ground of his having filed the bill with a knowledge of the objection(*d*)(146).

Where objections are made by a purchaser, evidently with a view to gain time, the Court itself will enter into the consideration of the objections, without referring the title to a Master. So where a bill is filed by a purchaser, the vendor, the defendant, has been allowed, after answer, and before the hearing of the cause, to move, that an

(*b*) *Brooke v. —*, 4 Madd. 212.

(*c*) V. C. 23 Feb. 1820, MS.

(*d*) *Stapylton v. Scott*, 16 Ves. jun. 272.

(146) See *Waters v. Travis*, 9 Johns. Rep. 450. on appeal.

(*221)

inquiry may be directed as to the title, and at what time the abstract was delivered, and whether it was sufficient. This was allowed, in order to enable the Court to dispose (*) of the cause with despatch(e). Again, where a vendor filed a bill for a specific performance, and the purchaser submitted to perform the contract if a good title could be made, asserting that upon the abstract a good title could not be made, it was, upon the motion of the plaintiff, referred to the Master to inquire whether a good title could be made, and whether it appeared upon the abstract that a good title could be made(f). Lord Eldon has observed, that some degree of irritation was excited in the Court by persons called land-jobbers, contracting for estates without any intention of paying for them, and setting up defects of title, merely with the view of gaining time, to dispose of them; and, on that ground, Lord Rosslyn was prevailed upon to direct a reference of the title immediately, on motion; and there is not much mischief in that upon a simple case of specific performance, where there is nothing more; but the relief may be so modified and qualified, with reference to the nature and object of the contract, that unless it is purely that point, great difficulty may arise(g).

In a later case, Lord Eldon directed a reference of the title, upon the bill of a vendor, before the answer was put in. The bill was a mere averment of the contract, putting no special fact in issue, and the Court considered the plaintiff as undertaking to do all such acts, for the purpose of executing what the Court thinks right, as if the answer was in, and the cause brought to a hearing. With that undertaking, if they cannot state any objection to the performance, and the reference is merely to look

(e) *Moss v. Matthews*, 3 Ves. jun. 279.

(f) *Wright v. Bond*, 11 Ves. jun. 39.

(g) 17 Ves. jun. 278.

into the title, his Lordship did not apprehend the answer to be necessary before that reference(*h*). But if the (*)defendant's counsel state that there are other objections, the title cannot be referred(*i*).

And in every case where the answer, upon reasons solid or frivolous, insists, that the agreement ought not to be executed, the Court must first dispose of the question raised(*k*). Therefore, where the question simply was, whether the vendor of a leasehold estate was bound to produce the lessor's title, a motion by the purchaser for a reference to the Master upon the title was refused(*l*). So where the defendant, the purchaser, alleges laches on the part of the plaintiff, as a ground for his not being compelled to perform the agreement, the Court will decide the question raised, before the title is referred to the Master(*m*).

Until lately, it was not the general practice, to make an inquiry, *ab ante*, at what time the plaintiff could make a title(*n*). If, upon the usual reference to the Master, to inquire whether the seller could make a good title, he reported in the affirmative, it might, with a view to costs, have been referred back to the Master, to inquire whether a good title could have been made at the filing of the bill ;

(*h*) *Balmanno v. Lumley*, 1 Ves. & Beam. 224.

(*i*) *Matthews v. Dana*, 3 Madd. 470.

(*k*) *Blyth v. Elmherst*, 1 Ves. & Beam. 1 ; see *Paton v. Rogers*, *ibid.* 351 ; *Biscoe v. Brett*, 2 Ves. & Beam. 377 ; *Fullagar v. Clark*, 18 Ves. jun. 481 ; *Morgan v. Shaw*, 2 Mer. 138 ; *Boehm v. Wood*, 1 Jac. & Walk. 419 ; *Withy v. Cottle*, 1 Turn. 78 ; 1 Sim. & Stu. 174 ; *Gordon v. Ball*, 1 Sim. & Stu. 178.

(*l*) *Gompertz v. —*, 12 Ves. jun. 17. See *Eldridge v. Porter*, 14 Ves. jun. 139 ; and see 17 Ves. jun. 278.

(*m*) See *Blyth v. Elmherst*, *ubi sup.* *Skelton's case*, 1 Ves. & Bea. 517 ; *Wallinger v. Hilbert*, 1 Mer. 104 ; *Lowe v. Manners*, 1 Mer. 19 ; *Portman v. Mill*, 2 Russ. 570.

(*n*) *Gibson v. Clarke*, 2 Ves. & Bea. 103. See *Jennings v. Hopton*, 1 Madd. 211 ; and see *Lubin v. Lightbody*, 8 Price, 606.

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and if not, when it was that a good title could be made(*o*); (*)and this reference might be made as well after a decree, as after an interlocutory order. The Vice-Chancellor (Sir John Leach) considered, that great additional expense and delay were occasioned by parties not asking, in the first instance, where the circumstances of the case made it material, that if the Master should find that a good title could be made, then that he might inquire when such good title was first shown to the purchaser(*p*). In a later case of *Harrington v. Secretan*, where the purchaser moved for a second order, the learned Judge, under the circumstances, granted the motion; but made a general rule, with the approbation of the bar, which he has since regularly followed, that the first reference should be to see whether a good title can be made, and if so, at *the request of either party*, to inquire when the seller showed a title. This rule appears to be entirely free from objection.

When the title is referred to the Master upon motion, and the report is against the title, the defendant may move to dismiss the bill with costs, and the Court can make the order without setting down the cause(*q*).

Where the purchaser has been a long time in possession of the estate, and of the abstract, without objecting to the title, a specific performance will be decreed at once without a reference as to the title(*r*). But the question depends upon a conclusion of fact. The Court must be satisfied that the purchaser intended to wave, and has actually waved his right of examining the title, and of course the waver may itself be rebutted by the conduct of

(*o*) *Daly v. Osborne*, 1 Mer. 332; *Birch v. Haynes*, 2 Mer. 444.

(*p*) *Hyde v. Wroughton*, 3 Madd. 279. See *Anon.* 3 Madd. 495.

(*q*) *Walters v. Pyman*, 19 Ves. 351; *Whitcomb v. Foley*, V. C. 1821, MS.; S. C. 6 Madd. 3.

(*r*) *Fleetwood v. Green*, 15 Ves. jun. 594; *Margravine of Anspach v. Noel*, 1 Madd. 310.

(*)the seller, *e. g.* in furnishing further documents to make out the title(s). This subject has already been discussed(*t*).

But even after it has been decided that the right to call for the title is waved, if for the purpose of settling the conveyance a deed is produced, which shows a bad title, a specific performance will not be decreed. This was decided in *Warren v. Richardson*(*u*). The Lord Chief Baron observed, that though the Court thought the defendant had by his conduct waved that right, it had come out collaterally, that the plaintiff could not make a title according to his contract. It would be a great hardship upon a party to force him to accept a title which was ascertained to be defective. It would be contrary to all the rules which prevail upon the subject of specific performance. The principles upon which courts of equity have proceeded on the subject of specific performance, do not make a decree for a specific performance the necessary consequence under all circumstances of an agreement. Circumstances of hardship often prevent it. They recollect that the party is not without remedy, for, though he should be refused a specific performance, he has left to him his action upon the agreement. What created the difficulty in this case was, that the conduct of the party had barred his right to the usual investigation into the title, and this defect was a defect of title. If the objection had been to the conveyance merely, the defendant would have had the full benefit of it without any doubt. But the objection was of another description: it was an objection to the title: it stood decided upon the record, that the defendant had waved his right to call upon the plaintiff for the production of his title; on the other

(*s*) *Burroughs v. Oakley*, 3 Swanst. 159.

(*t*) *Supra*, p. 10.

(*u*) 1 You. 1.

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(*)hand, it was clear that the plaintiff could make no good title, and if the defendant took it, it would be defective.

A new practice has sprung up, by which certainly some suits have been quickly disposed of, but which has been a great surprise upon many parties. I allude to the practice of ordering a purchaser *in possession of the estate* upon motion to pay the purchase-money into court. This, under special circumstances, has been done even before answer(*x*); but the purchaser has, in some cases, had the option to pay the money, or give up possession(*y*); in others, an occupation-rent has been set, deducting interest on the deposit(*z*); and, in others, a receiver has been appointed(*a*). And payment of the money will be ordered, although by the agreement it is payable by instalments, and a portion of it is to remain secured upon the estate(*b*).

• This rule has been adopted where the possession has been given under a mutual apprehension that the title could be immediately made good(*c*)—where the purchaser had a sort of mixed possession with the vendor, and had paid part of the purchase-money, was insolvent, and had attempted without effect to sell the estate(*d*)—where the purchaser approved of the title and prepared a conveyance, and then raised objections(*e*)—where the purchaser

(*x*) *Dixon v. Astley*, 1 Mer. 133. See *Burroughs v. Oakley*, 1 Mer. 52, 376; *Blackburn v. Stace*, 6 Madd. 69.

(*y*) *Clarke v. Wilson*, 15 Ves. 317; *Smith v. Lloyd*, 1 Madd. 83; *Morgan v. Shaw*, 2 Mer. 138; *Wickham v. Everest*, 4 Madd. 53.

(*z*) *Smith v. Jackson*, 1 Madd. 618; *Smith v. Lloyd*, 1 Madd. 83.

(*a*) *Hall v. Jenkinson*, 2 Ves. & Beam. 125. See *Clarke v. Elliott*, 1 Madd. 606.

(*b*) *Younge v. Duncombe*, 1 You. 275.

(*c*) *Gibson v. Clarke*, 1 Ves. & Beam. 500. See 1 Madd. 607.

(*d*) *Hall v. Jenkinson*, 2 Ves. & Beam. 125.

(*e*) *Watson v. Upton*, Coop. 92, n. But see *Bonner v. Johnston*, 1 Mer. 366; and See *Crutchley v. Jerningham*, 2 Mer. 502; *Fournier v. Edwards*, T. T. 1819, V. C. The deeds were executed, and an ap-

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(*)had been guilty of laches, and cut underwood(*f*). Even in a case where it appeared on the face of the abstract that the title was bad, but the purchaser had sold and conveyed the estate to another purchaser(*g*). So where from circumstances an acceptance of the title was inferred(*h*)—again, where a time was fixed for payment of the purchase-money by instalments, and the property was a *coal-mine*(*i*). In all these cases the rule has been applied, and if the estate be sold under a *decree*, the purchaser, if he enters into possession, will be compelled to pay his purchase-money into court, unless he entered with the express consent of the *Court*(*k*).

But where the sale is not by the Court, and the seller has thought proper to put the purchaser into possession, with an understanding between them that he shall not pay his money until he has a title, the purchaser cannot be called upon to pay the money into court in this summary way(*l*), nor can the payment be compelled where the vendor gives possession without stipulation(*m*), or the purchaser was in possession under another title before the contract(*n*); or the possession was given independently of the contract, and the seller has been guilty of laches(*o*), although in such cases the purchaser

plication was made for the completion of the purchase, but the purchaser had not the money. The motion was made upon the answer, by which the defendant claimed compensation for some charges.

(*f*) *Burroughs v. Oakley*, 1 Mer. 52, 376; *Dixon v. Astley*, 1 Mer. 133, 378, n.; *Bradshaw v. Bradshaw*, 2 Mer. 492.

(*g*) *Brown v. Kelty*, L. I. Hall, July 1816, MS.

(*h*) *Boothby v. Walker*, 1 Madd. 197; and see *Smith v. Lloyd*, 1 Madd. 83.

(*i*) *Buck v. Lodge*, 18 Ves. jun. 450.

(*k*) *Anon.* L. I. Hall, 16 July 1816, MS.

(*l*) *Gibson v. Clarke*, 1 Ves. & Beam. 500.

(*m*) *Clarke v. Elliot*, 1 Madd. 606.

(*n*) *Freebody v. Perry*, Coop. 91; *Bonner v. Johnston*, 1 Mer. 366.

(*o*) *Fox v. Birch*, 1 Mer. 105.

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(*)may make himself liable to the demand, by dealing improperly with the estate, *e. g.* cutting trees, or selling it to another person(*p*).

Perhaps two simple rules may be deduced from the cases: 1st. Where the possession is taken under the contract, or is consistent with it, and the purchaser has not dealt improperly with the estate, the cause must take its regular course.

But 2d, If the possession by the purchaser, without payment of the money, is contrary to the intention of the parties, or is held according to it, but the purchaser has exercised improper acts of ownership, for example, cutting timber, by which the property is lessened in value, or selling the estate, by which the first seller's remedy is complicated without his assent; in such cases, the Court will interpose and compel the purchaser to pay the purchase-money into court.

Where the sum is large, the Court has allowed a long day, for instance, three months for payment of the money(*q*); and under proper circumstances, the time will be enlarged(*r*).

Where a vendor files a bill for an injunction and a specific performance, the Court will, upon granting the injunction, put him upon proper terms, and therefore will in most cases order him to pay the deposit into court. But where the seller at the time of the bill filed is able and willing to make a good title to the estate sold, and the purchaser improperly refuses to complete the contract, (*)although the seller is in possession of the estate, he will not be compelled to pay the deposit into court, be-

(*p*) *Cutler v. Simons*, 2 Mer. 103; *Bramby v. Teal*, 3 Madd. 219; *Gill v. Watson*, *ibid.* 225.

(*q*) *Townshend v. Townshend*, L. I. Hall, March 3, 1817, Master of the Rolls for the Lord Chancellor. MS.

(*r*) *Brown v. Kelty*, Michaelmas Term, 1816, MS., the Vice-Chancellor for the Lord Chancellor; *Townshend v. Townshend*.

cause it is the fault of the purchaser and not of the seller that the latter retains both the deposit and the estate(s).

Although the defendant, by his answer, put in issue an objection to the title, and both parties examine witnesses to the point before the hearing, yet, upon a reference to the Master, both sides may produce further evidence before him(t).

If the seller has vested in him legally, or equitably, all the interest in the estate, it cannot be objected to the Master's report in favor of the title that the legal estate is outstanding, although in a lunatic, against whom no commission has issued(I). The vendor has the power, provided he will take the means necessary for the purpose of making a good title. If he neglect this, the question will properly arise when the Master comes to settle the conveyance(u).

Where an estate is sold in lots to different persons, the vendor cannot include them in one bill, for each party's case is distinct, and must depend upon its own peculiar circumstances, and there must be a distinct bill upon each contract(x). In demurring to a bill against distinct purchasers, as multifarious, the defendants need not deny combination(y), although that was formerly deemed essential(z).

If the purchaser's defence to a bill for a specific performance (*)rest merely on the want of title in the vendor, he ought to depend on his answer, and not to file a cross-bill to have the agreement delivered up; because

(s) *Wynne v. Griffith*, 1 Sim. & Stu. 147.

(t) *Vancouver v. Bliss*, 11 Ves. jun. 458.

(u) *Berkeley v. Dauh*, 16 Ves. jun. 380.

(x) *Rayner v. Julian*, 2 Dick. 677; *Brookes v. Lord Whitworth*, 1 Madd. 86.

(y) *Brookes v. Whitworth*, 1 Madd. 86.

(z) *Bull v. Allen*, Bunb. 69.

(I) This is not now a serious difficulty.

the vendor can make no use of the contract if he have no title(a). And a purchaser should not make the stewards or receivers of the vendor parties to his bill for a specific performance; for although, as we have already seen, the vendor is deemed a trustee for the purchaser, yet this rule does not extend to the agents of the vendor(b).

Where the plaintiff, in a bill for a specific performance, cannot prove his agreement, as laid; but the defendant, who proves the agreement to be different, offers to perform specifically the agreement which he represents; the Court will execute the agreement as proved by the answer, without a cross-bill, although the plaintiff should wish to have the bill dismissed(c), if the Court think the defendant entitled to a specific performance(d)(147).

But, if a plaintiff insist upon a particular construction of a contract, and the Court decides against him, he will not be allowed a specific performance according to the construction against which he has contended. It is not like the case of a plaintiff calling upon the Court to construe and execute an agreement according to the true construction; suggesting that which he conceives to be so(e).

If a bill for a specific performance be dismissed, it would require a clear and distinct case to be made out and prayed, to entitle the plaintiff to an account of rents, or the like(f).

(*)If a purchaser have recourse to equity, and it appear that the vendor has, since the filing of the bill, sold the

(a) *Hilton v. Barrow*, 1 Ves. jun. 284.

(b) *Macnamara v. Williams*, 6 Ves. jun. 148.

(c) *Fife v. Clayton*, 13 Ves. jun. 546.

(d) *Higginson v. Clowes*, 15 Ves. jun. 516.

(e) *Clowes v. Higginson*, 1 Ves. & Beam. 524.

(f) *Williams v. Shaw*, 3 Russ. 178, and *Stevens v. Guppy*, 3 Russ. 171.

(147) See *Askew v. Poyas*, 2 Des. 145.

estate to another person, the Court will, it has been determined, refer it to a Master to inquire what damage the purchaser has sustained ; and the sum which shall be found due, together with costs, will be directed to be paid to him(*g*)(148). Equity, however, cannot give the purchaser any compensation where he files a bill to have the contract delivered up on account of the defective title of the vendor. But he will obtain a decree for delivering up of the contract, without prejudice to his remedy at law for breach of it(*h*)(149).

In a recent case, upon a specific performance, where Lord Eldon refused to direct an issue or an inquiry before the Master, with a view to damages, his Lordship said, that the plaintiff must take that remedy, if he chooses it, at law. In *Denton v. Stewart*, the defendant had it in his power to perform the agreement, and put it out of

(*g*) *Denton v. Stewart*, 1 Cox, 258 ; 1 Ves. jun. 329 ; 17 Ves. jun. 276, cited ; Reg. Lib. A. 1785, fol. 552, 717 ; *supra*, p. 116, n. ; *Greenway v. Adams*, 12 Ves. jun. 395.

(*h*) *Gwillim v. Stone*, 14 Ves. jun. 128.

(148) As to the principles by which a court of equity will be governed in retaining a bill for a compensation in damages, in cases where the agreement cannot be specifically decreed, see *Hatch v. Cobb*, 4 Johns. Ch. Rep. 559. *Kempshall v. Stone*, 5 Johns. Ch. Rep. 193. *Phillips v. Thompson*, 1 Johns. Ch. Rep. 131. *Hepburn v. Auld*, 5 Cranch, 262, 275. *Sims' Admr. v. Lewis*, 5 Munf. 29.

In *Fulweiler v. Baugher*, 15 S. & R. 45, where the action was on bonds, being part of the consideration of land sold ; and it being agreed that the title was defective for a part, which was to be cured by a title to be given by the plaintiff, *held*, that in the event of the plaintiff's inability to give a title, the court will grant a new trial. "It is like the case where part is recovered from the vendee by adverse title ; in which case the price of that part, in proportion to the residue, is to be deducted from the bond, before any interest is calculated on the bond. But to this there may be an exception, if the vendee has enjoyed the land during the time interest is demanded ; and this is a matter of evidence for the jury."

(149) See *Sims' Admr. v. Lewis*, *ut supra*.

his power pending the suit. The case, if it was not to be supported upon that distinction, was not according to the principles of the Court(*i*).

In a late case(*k*), where a seller had, after a contract for sale, sold at an advance to another person, the bill filed by the first purchaser prayed, that if the second purchaser bought without notice, the seller might account to the plaintiff for the advanced price. It was not necessary to decide the point; but Lord Eldon observed, that the estate by the first contract, becoming the property of the vendee, the effect was, that the vendor was seized as a (*)trustee for him; and the question then would be, whether the vendor should be permitted to sell for his own advantage the estate of which he was so seised in trust, or should not be considered as selling it for the benefit of that person for whom, by the first agreement, he became trustee, and therefore liable to account. The ultimate decision was, that the first purchaser was entitled to a specific performance against the seller and the second purchaser, the latter being considered to take subject to the equity of the first purchaser, to have a conveyance of the estate at the price which he agreed to pay for it (*l*).

But where the contract has been executed, a bill cannot be filed simply for compensation, *e. g.* where the rental of the estate was represented higher than its actual amount(*m*).

It may here be observed, that if an exception taken to a report that a good title cannot be made, be overruled, the vendor should obtain an order for the exception to

(*i*) *Todd v. Gee*, 17 Ves. jun. 273; *Blore v. Sutton*, 3 Mer. 237, *Kendall v. Beckett*, 2 Russ & Myl. 88.

(*k*) *Daniels v. Davison*, 16 Ves. jun. 249.

(*l*) 17 Ves. jun. 433.

(*m*) *Newham v. May*, 10 Price, 117.

stand over ; as, if disallowed, it would appear upon record that a good title could not be made(*n*).

If the abstract be not delivered in time, or objections arise to the title, the vendee may bring an action at law for non-performance of the agreement, in which case the vendor's remedy (if he can insist on the contract being specifically performed) is to file a bill for a specific performance, and an injunction to restrain the proceedings at law ; and the vendor may file his bill for a performance *in specie*, although the vendee may have recovered his deposit at law. If an injunction be granted, the Court will not dissolve it without the Master's report as to the (*)title, where the action is brought on the ground of want of title(*o*).

If a purchaser, upon a bill being filed for a specific performance, pay the purchase-money without putting in an answer, and afterwards discover that a fraud was committed in the sale, he is not precluded from bringing an action for damages if he come recently after discovery of the deception(*p*).

But if a defendant in a suit for a specific performance, after a decree, bring an action at law against the plaintiff in equity for damages, and the decree proceeded upon the ground that he had waved the literal performance of the thing, for breach of which the action is brought, *e. g.* the time appointed for performance of the contract, Equity will enjoin the action(*q*).

Where the purchaser has paid any part of the purchase-money, and the seller does not complete his engagement, so that the contract is totally unexecuted, he, the purchaser, may affirm the agreement, by bringing an action

(*n*) See 1 Ves. jun. 567.

(*o*) Church v. Legeyt, 1 Pr. 301.

(*p*) Jeudwine v. Slade, 2 Esp. Ca. 257.

(*q*) Reynolds v. Nelson, 6 Mad. 290.

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for the non-performance of it, or he may elect to disaffirm the agreement *ab initio*, and may bring an action for money had and received to his use(*r*)(150).

In this latter action, however, the plaintiff cannot recover more than the money paid, although the estate has risen in value ; while, on the other hand, it may perhaps be thought, that if the estate has experienced a diminution in value, he can only recover the damages he sustained by the estate not being conveyed; that being the only money retained by the defendant against conscience ; (*)and therefore the plaintiff, *ex æquo et bono*, ought not to recover any more(*s*)(151).

The right to disaffirm the agreement is, in some cases, of great importance. If an agent enter into an agreement on behalf of his principal, but on the face of the agreement the agent appear to be the real purchaser, and is so considered by the vendor, yet if the purchaser actually pay the deposit, although through the medium of his agent, and the vendor do not complete his engage-

(*r*) See 2 Burr. 1011 ; Farrer v. Nightingale, 2 Esp. Ca. 639 ; Hunt v. Silk, 5 East, 449 ; Squire v. Tod, 1 Camp. N. P. 293. See Levy v. Haw, 1 Taunt. 65.

(*s*) See Moses v. M'Farlan, 2 Burr. 1005 ; Dutch v. Warren, *ib.* 1010, cited ; and Str. 406 ; S. C. Dale v. Sollet, 4 Burr. 2133, *sed. qu.*

(150) See *Weaver v. Bentley*, 1 Caines' Rep. 47. *Gillet v. Maynard*, 5 Johns. Rep. 85, and see S. C. note a. p. 88, where the principal authorities are collected. So, a vendor, by bringing a suit and obtaining judgment for the purchase money, confirms the sale, so that he cannot, afterwards, set it aside. *Nelson v. Carrington*, 4 Munf. 332.

(151) If there be no fraud, and no covenants taken to secure the title, the purchaser of real estate has no remedy for the purchase-money on a failure of title. *Abbot v. Allen*, 2 Johns. Ch. Rep. 519. See *Dorsey v. Jackman*, 1 Serg. & Rawle, 42. *Howes v. Barker*, 3 Johns. Rep. 506. Note, the authority of *Moses v. M'Farlans*, referred to in the text, has been much questioned. See *O'Harra v. Hall*, 4 Dall. 340, 341. ; and see 1 Serg. and Rawle, 51.

ment, so that the contract is rescindable, the purchaser himself may maintain an action for recovery of the deposit, which will be considered as money received by the vendor to the use of the real purchaser(*t*).

But if a man enter into a contract expressly *as agent for a third person*, although really for his own benefit, and the other party has no notice that the supposed agent is the principal, the latter cannot maintain an action upon the contract without first disclosing to the other party that he is the principal(*u*).

Where a purchaser rests his action on a defect in the title, it is not sufficient to show that the title has been deemed insufficient by conveyancers, but he must prove the title bad(*x*).

If he succeed in proving the title bad, he will, according to the counts upon which he recovers, obtain a verdict either for his deposit, or for damages, which in most cases would be regulated by the amount of the deposit.

If he declare on the common money-counts, he of course (*) cannot obtain any damages for the loss of his bargain; and even if he affirm the agreement by bringing an action for non-performance of it, he will obtain nominal damages only for the loss of his bargain(*y*), because a purchaser is not entitled to any compensation for the fancied goodness of his bargain which he may suppose he has lost, where the vendor is, without fraud, incapable of making a title(152).

(*t*) *Duke of Norfolk v. Worthy*, 1 Camp. Ca. 337. See *Edden v. Read*, 3 Campb. Ca. 338; *Bethune v. Farebrother*, 5 Mau. & Selw. 385, 391, cited.

(*u*) *Bickerton v. Burrell*, 5 Mau. & Sel. 383.

(*x*) *Camfield v. Gilbert*, 4 Esp. Ca. 221.

(*y*) *Flureau v. Thornhill*, 2 Blaks. 1078; and see 3 Bos. & Pull. 167. See *Brig's case*, Palm. 364.

(152) Where land is sold with warranty, and the purchaser is evicted, the measure of damages, *unless fraud has been practised*, is the price (*235)

And in a late case(z), where an auctioneer who had advanced some money on an estate, sold it by auction after the authority from his principal had expired, and the principal refused to confirm the sale, the Court of Common Pleas, in an action brought by the purchaser, in which he declared on the agreement, and for money had and received, &c. would not allow him damages for the loss of his bargain, although it was proved that the estate was worth nearly twice the sum which he gave for it.

But in a recent case(a), where a person who had contracted for the purchase of an estate, but had not obtained a conveyance of it, sold it by auction with a stipulation to make a good title by a day named, but which he was unable to do, as the vendor to him refused to convey, it was held, that the purchaser by auction might, beyond his expenses, recover damages for the loss which he sustained by not having the contract carried into effect. Lord Tenterden observed, that upon the present occasion he could only say, that if it is advanced as a general proposition, that where a vendor cannot make a good title, the purchaser shall recover nothing more than nominal damages, he was by no means prepared to assent to it. If it were necessary to decide the point, he should desire (*)to

(z) *Bratt v. Ellis*, MS. Appendix, No. 7 ; and see *Jones v. Dyke*, MS. Appendix, No. 8.

(a) *Hopkins v. Grazebrook*, 6 Barn. & Cress. 31 ; 9 Dowl. & R. 22, S. C.

agreed to be paid by the purchaser. In cases of fraud, the jury are not limited to the price, but may award in damages the amount of the injury sustained by the loss of the land. *King v. Pyle*, 8 S. & R. 166. If notice is duly given of the suit, and the warrantor does not defend, the record of the recovery is conclusive against him, in an action of covenant on the warranty. If the vendee defends without giving notice, he cannot recover his expenses, unless in a case of fraud or the absence of the warrantor. *Fulweiler v. Baugher et al.* 15 ib. 45.

have time for consideration. But the circumstances of this case showed that it differed very materially from that which had been quoted from Sir W. Blackstone's Reports. There the vendor was the owner of the estate, and an objection having been made to the title, he offered to convey the estate with such title as he had, or to return the purchase-money with interest ; here no such offer was or could be made. The defendant had unfortunately put the estate up to auction before he got a conveyance. He should not have taken such a step without ascertaining that he would be in a situation to offer *some* title, and having entered into a contract to sell, without the power to confer even the shadow of a title, he must be responsible for the damage sustained by a breach of his contract. Mr. Justice Bayley said, that the case of *Flureau v. Thornhill* was very different from this, for here the vendor had nothing but an equitable title. Now where a vendor holds out an estate as his own, the purchaser may presume that he has had a satisfactory title, and if he holds out as his own that which is not so, he may very fairly be compelled to pay the loss which the purchaser sustains by not having that for which he contracted.

This case is one of great importance, and will, I fear, tend to much litigation before the distinction which it introduces is thoroughly understood.

In the later case of *Walker v. Moore*(*b*), where after the contract the abstract was delivered and showed a good title, but it had not been examined with the deeds ; the purchaser resold the estate at a profit, and then upon an examination of the deeds it appeared that the title was defective, and he had to pay to the second purchasers the costs of investigating the title ; it was held that the original purchaser could not recover from the original (*)seller the costs of the resale or the costs paid to the

(*b*) 10 Barn. & Cres. 416.

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second purchasers, or any damages for the loss of the bargain. The case of *Hopkins v. Grazebrook* was said to be very different from this. There the defendant had sold property as his own which was not so, and the Court was of opinion that the defendant being in fault, by representing himself as the owner of the property, the plaintiff's right was not restrained to nominal damages. Here the defendants undertook to make a good title, and they might honestly think they should be enabled to do so. The right to damages generally was held to be concluded by *Flureau and Thornhill*. And as to the expenses upon the resale, as there was no fraud, negligence in preparing the abstract was the only thing that could be imputed to the sellers, and the purchaser by exercising ordinary care might have averted the loss that had arisen from that negligence. It is usual and reasonable, before any expense is incurred, to examine the abstract with the deeds, and the purchaser ought not to recover expenses which he had sustained by reason of his having contracted to resell the premises before he had taken the trouble to ascertain whether the abstract was correct or not.

But one of the Judges expressed his opinion, that if the abstract had been examined with the deeds and found correct, the purchaser might perhaps have been justified in acting on the faith of having the estate, and if after that time he had made a sub-contract, the learned Judge thought he would have been entitled to recover the expenses attending it, if it failed in consequence of any defect in the title of his vendor. And further, if there were *mala fides* in the original vendor (but not otherwise), he was not prepared to say that the purchaser might not recover the profits which would have arisen from the resale.

In a case of this nature a purchaser is not entitled to any compensation, although he may be a loser by having (*)sold out of the funds, which may have arisen in the

mean time, because he had a chance of gaining as well as losing by a fluctuation of the price(c).

But a purchaser is entitled to interest on his deposit(d); and if the residue of the purchase-money has been lying ready without interest being made by it, he is entitled to interest on that(e). Where the plaintiff recovers under a special count on the original contract, which, we have seen, affirms the agreement, interest will be given as part of the damages for non-performance of the agreement: where he recovers under a count for money had and received, which disaffirms the contract, and to which is mostly added a count for interest, it may, it should seem, be recovered as damages sustained by the plaintiff, by reason of the money having been withheld from him. If, however, the original contract is void, as, if it be a parol agreement for the sale of lands, the purchaser can only recover his deposit in an action for money had and received, and will not be allowed interest(f)(153).

Where the plaintiff declares on the original contract, and lays the expenses incurred in investigating the title, &c. as special damages, he will be entitled to recover them as such(g). In one case Lord Ellenborough threw out a doubt upon this(h); but in a subsequent case before his Lordship, in which Gibbs, C. J., then at the bar, was counsel for the vendor, the defendant, a purchaser, ob-

(c) *Flureau v. Thornhill*, 2 Blackst. 1078.

(d) See ch. 10, *infra*.

(e) *Flureau v. Thornhill*, *ubi sup*.

(f) *Walker v. Constable*, 1 Bos. & Pull. 306. In this case, however, the rule was laid down generally, that interest could not be recovered in an action for money had and received; and see *Tappenden v. Randall*, 2 Bos. & Pull. 472, *sed qu.*; and see ch. 10, *infra*.

(g) *Flureau v. Thornhill*, *ubi sup.*; *Richards v. Barton*, 1 Esp. Ca. 268; *Bratt v. Ellis*; *Jones v. Dyke*, App. Nos. 7 & 8.

(h) *Camfield v. Gilbert*, 4 Esp. Ca. 221.

(153) See *Pease v. Barber*, 3 Caines' Rep. 366, 367.

tained a verdict for his deposit with interest, and the (*)*expenses of investigating the title*, without argument, it being admitted that the title was defective(i): in a still later case, they were also recovered by a purchaser(k); and there are other cases not reported, in which I am told such expenses have been recovered. If the rule were otherwise, it would induce many persons upon speculation to offer an estate for sale, knowing the title to be bad; and yet, in a late case at *nisi prius*, Mansfield, C. J. held, that the purchaser was not entitled to recover back the expenses of investigating the title(l).

But clearly the expenses cannot be recovered under a count for money had and received; and Lord Ellenborough has decided that they cannot be recovered under a count for money paid, &c. to the defendant's use, as the money is expended for the purchaser's own satisfaction as to the title which he is about to take(m)(154). Nor can the expenses of investigating the title be recovered from the auctioneer(n). The expense of preparing the conveyances can hardly in any case be recovered,

(i) *Turner v. Beaurain*, Sitt. Guildh. cor. Lord Ellenborough, C. J., 2d June 1806. MS.

(k) *Kirtland v. Pounsett*, 2 Taunt. 145. See p. 146.

(l) *Wilde v. Fort*, 4 Taunt. 334. Note, the C. J. also ruled, that interest on the deposit is not recoverable, which is contrary to other authorities; and too large a construction, according to other authorities, appears to have been put on the statute of Elizabeth.

(m) *Camfield v. Gilbert*, 4 Esp. Ca. 221.

(n) *Lee v. Munn*, 1 Holt, 569.

(154) In *covenant* brought by the grantee against the grantor, for breach of the covenant against incumbrances in a deed, the plaintiff is entitled to recover, not only the purchase money, and the interest, but also the costs of the ejectment against him. *Waldo v. Long*, 7 Johns. Rep. 173. See *Staats v. Ten Eyck's Exrs.* 3 Caines' Rep. 111. *Pitcher v. Livingston*, 4 Johns. Rep. 1. *Marston v. Hobbs*, 2 Mass. Rep. 483, 440.

for they should not be prepared before the title is accepted(*o*).

Where a vendee brings an action on account of the agreement not having been completed, he will be compelled to give the vendor a particular of every matter of fact which he means to rely upon at the trial, as having been a cause of his not being able to complete the purchase; but he is not bound to state in his particular any (*)of the objections in point of law arising upon the abstract(*p*).

But where no particular has been obtained, the plaintiff is not confined to the objections which he may have stated to the defendant, but may take advantage of any other, which may entitle him to recover as for breach of the agreement(*q*).

To entitle a vendor to sustain an action for breach of contract, it has been said, that he must show what title he has; it not being sufficient to plead that he has been always ready and willing, and frequently offered to make a title to the estate(*r*). In a late case(*s*), however, where a vendor averred, *that he was seised in fee*, and made a good and *satisfactory* title to the purchaser of the estate, by the time specified in the conditions of sale, it was held sufficient, and that it was not necessary for him to show how he deduced his title to the fee. And the Court seemed of opinion, in opposition to the prior cases, that a vendor need not display his whole title on the record. This decision, without working an injustice, will

(*o*) *Jarmain v. Egelstone*, 5 Carr. & Pay. 172.

(*p*) *Collet v. Thomson*, 3 Bos. & Pull. 246.

(*q*) *Squire v. Tod*, 1 Camp. Cas. 293.

(*r*) *Philips v. Fielding*, 2 H. Blackst. 123; and see *Duke of St. Alban's v. Shore*, 1 H. Black. 270; *Luxton v. Robinson*, Dougl. 620.

(*s*) *Martin v. Smith*, 6 East, 555; 2 Smith, 543; and see *Co. Litt.* 303, b; *Terry v. Williams*, 1 Moore, 498.

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in most cases render it unnecessary to load the pleadings with the title of the vendor.

But even if the title is set out, yet the execution of the title-deeds need not be proved, because that is never required of a vendor(*t*). This was decided by Lord Kenyon at *nisi prius*. To prove the plaintiff's title to a right of way sold, the deeds were produced; and it was objected, that the deeds themselves should first be made evidence, by producing the subscribing witnesses. (*) But Lord Kenyon ruled it not to be necessary. He said, he would never allow, where the question was respecting a title, that the party should be called upon to prove the execution of all the deeds deducing a long title; that it was never mentioned in the abstract, or expected in making out a title in any case of a purchase, more particularly where possession has accompanied them: he therefore admitted them without proof of the execution(*u*). In a late case, however, before Lord C. J. Mansfield, at *nisi prius*, where in assumpsit upon an agreement to purchase a leasehold house, it appeared that the plaintiff, the vendor, was the third or fourth assignee of the term; and it was contended, that he need only prove the execution of the last assignment: it was ruled otherwise; and he was compelled to prove the lease and all the mesne assignments(*x*). Lord Kenyon's decision was not however adverted to; and as that clearly coincides with the practice in these cases, it can scarcely be considered as overruled(*I*).

If the agreement is in the hands of one of the parties, or his attorney, equity, in case a bill is filed, will compel

(*t*) Thomson v. Miles, 1 Esp. Ca. 184.

(*u*) Thomson v. Miles, *ubi sup*.

(*x*) Crosby v. Percy, 1 Camp. Ca. 303.

(*I*) The vendor's counsel cited Nash v. Turner, 1 Esp. Ca. 217; but Mansfield, C. J. thought that it did not apply.

it to be delivered up to the other party, in order that it may be stamped(*y*). So, in case of an action, if only one part of the agreement has been executed, the party, in whose possession it is, shall be compelled to produce it to the other party(*z*). And if there are even two parts, but one only is stamped, the party having the unstamped part may give secondary evidence of the contents of the (*)agreement, if the other, after notice, refuse to produce the stamped part(*a*). Where one party produces the agreement, under a notice from the other, the latter need not call the subscribing witness to prove the execution of the agreement, as the defendant takes an interest under it(*b*)(155).

Where a contract is not completed merely on account of objections to the title, and the vendor thinks his title good, he frequently brings an action at law for non-

(*y*) *Supra*, p. 87.

(*z*) *Blakey v. Porter*, 1 Taunt. 396; *Bateman v. Philips*, 4 Taunt. 157; *King v. King*, *ib.* 666; *Street v. Brown*, 1 Marsh. 610.

(*a*) *Garnons v. Swift*, 1 Taunt. 507. See *Waller v. Horsfall*, 1 Camp. Ca. 501.

(*b*) *Bradshaw v. Bennett*, 5 Carr. & Pay. 48.

(155) Where a subscribing witness is dead or abroad, in an action on the instrument it is necessary to give some evidence of the identity of the party executing with the party sued, the naked proof of the handwriting of the subscribing witness is insufficient. If the attestation state the residence of the party, proof that the party sued resided there, would, as it seems, be *prima facie* evidence. *Whitelocke v. Musgrove*, 1 C. & M. 511; 3 Tyr. 541, S. C. This case may be considered as overruling the decisions of Lord Tenterden and Best, Ch. Js. in *Mitchell v. Johnson*, M. & M. 176; *Page v. Mann*, *ib.* 79; *Kay v. Brookman*, *id.* 286; and as settling a question which had long been a subject of doubt at N. P.

In an action by the vendee against the vendor of an estate, to recover the deposit money on a contract for the purchase, if the defendant on notice produce the contract, the plaintiff need not prove the contract. *Bradshaw v. Bennett*, 1 Moo. & M. 143; 5 C. & P. 48, S. C.

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performance of the agreement, instead of filing a bill for a specific performance.

It becomes therefore material to consider, whether courts of law can take cognizance of equitable objections to a title; because, if they cannot, a purchaser should in such cases file a bill in equity: he might otherwise be compelled to pay damages for not accepting a title, which, although good at law, might be invalid in equity.

The action which a vendor must bring, being founded upon the equitable circumstances of the case between the parties, it seems that a court of law may in such action take cognizance of equitable objections to a title; and if there were any, ought not to permit the plaintiff to recover.

In a recent case(c), the Court of B. R. would not permit the assignees of a bankrupt to recover money from his trustees, because the deed by which the trusts were created, although perhaps void at law, would probably be restored and set up again by a court of equity. The Court, I am informed, said they would not permit the (*)assignees to recover, as it would be to no purpose. It would be merely driving the trustees to the other side of the hall, where they would most likely regain the property. This case seems in point; the same observation would apply to a vendor endeavoring to obtain the purchase-money where there were equitable objections to his title: the court would naturally say, *cui bono*, when the purchaser can compel you to repay it in equity?(156).

(c) Shaw v. Jakeman, 4 East, 201.

(156) That the mere cancelling a deed under which one holds real estate, will not divest the title or re-vest it in the grantor, is abundantly settled. Hatch v. Hatch, 9 Mass. 311; Dando v. Tremper, 2 Johns. 87; Lewis v. Payn, 8 Cowen, 75; Botsford v. Morehouse, 4 Conn. 550; Gilbert v. Bulkley, 5 ib. 262; Holbrook v. Tirrell, 9 Pick. 105. But if the grantee delivers back his deed with a view to a conveyance

Lord Kenyon held, that a court of law could not enter into equitable objections to a title *where the purchaser is plaintiff*(*d*); but Lord Alvanley(*e*) decided, that if a purchaser would be liable in equity, he is entitled to recover his deposit at law. The last case is certainly a very strong authority, because no Judge sitting in a court of law could be more averse than Lord Alvanley was to assume any equitable jurisdiction(*f*). His decision has been followed in a recent case, which appeared to have set the point at rest(*g*). Lord C. J. Gibbs said, that the question was, whether the contract were merely for a good title, or for a legal and equitable title. Now the words of the condition were, that a good title should be made out at the vendor's expense. What can the meaning of that be, except that there shall be a good title both at law and in equity? The vendor, therefore, not having made out a good equitable title, the contract on the part of the defendant is broken. It is true that we are in a court

(*d*) *Allpass v. Watkins*, 8 Term Rep. 516.

(*e*) *Elliott v. Edwards*, 3 Bos. & Pull. 181.

(*f*) See *Johnson v. Johnson*, 3 Bos. & Pull. 162.

(*g*) *Maberly v. Robins*, 1 Marsh. 258; 5 Taunt. 625; *Curling v. Shuttleworth*, 6 Bing. 121; 3 Moo. & P. 368, S. C. In *Willett v. Clarke*, 10 Price, 207, the Judges did not agree in opinion upon this point.

to a purchaser, who receives a deed, without fraud, he will hold the land against a creditor of the original grantee. It is no fraud upon creditors, for he received an equivalent for his land. But where the object of cancelling the deed and obtaining a new one from the grantee being to defeat an attachment by a creditor if the first grantee, the conveyance will be fraudulent. *Holbrook v. Tirrell*, 9 Pick. 105; *Marshall v. Fisk*, 6 Mass. 32. Parsons C. J. says "it was a vested estate in S. & F. and could not be divested by cancelling the deed from A., F. therefore he continued seized of his moiety, when it was taken on the execution of W. against him; *because the second conveyance being fraudulent, is void as to the attaching creditors and because the cancelling of A.'s first deed did not divest F. of his moiety conveyed by it.*"

of law, but we are on the question whether the contract have been complied with. According to the defendant's (*)doctrine, if an estate be devised to *A. B.* and [in trust] for *C.* it might be sold by *A.* and *B.* only, since they could give a legal title to it without the concurrence of *C.* And, if this principle were to be followed up, the defendant might bring an action for the remainder of the purchase-money. The rest of the Court concurred with this opinion, Mr. Justice Chambre observing, that there was no reason why questions respecting equitable title should not come incidentally before a court of law. Yet in *Boyman v. Gutch*(*h*), the Court of C. P. held that they must decide upon the construction of the trust deed under which the estate was sold, and abide by their construction; that they were not to consider themselves as a court of equity where the seller is seeking to enforce the purchase, in which case the Court frequently refuses the aid of its authority to enforce a specific performance where the title is of an unmarketable or even doubtful description, leaving the party to his action at law for damages, but they were called upon to answer the simple question upon the record, whether on the construction of a deed, the seller had or had not a legal title to convey to a purchaser. It appeared to them that the seller had the right to put up the property to sell, and to sell the same. Whether a court of equity would compel a purchaser to accept such a title was a question they were not called upon to determine. All that they professed to determine was the legal construction of the deed.

Before quitting this subject, it must be remarked, that in agreements for purchase, the covenants are construed according to the intent of the parties; and they are therefore always considered dependent, where a contrary inten-

(*h*) 7 Bing. 379; 5 Moo. & P. 222, S. C.

(*244)

tion (*) does not appear (i), (I). The true rule, Lord C. J. Mansfield, in a late case (k), said, was, that it is not the employment of any particular word which determines a condition to be precedent, but the manifest intention of the parties (157).

The old law was certainly in favor of the contrary doctrine (l); but if, as Lord Kenyon observed, the Courts were to hold otherwise than they now do, the greatest injustice might be done; for supposing, in the instance of a trader who had entered into a contract for the sale of an estate, that between the making of the contract and the final execution of it he were to become a bankrupt, the vendee might be in the situation of having had payment enforced from him, and yet be disabled from procuring the property for which he had paid (m).

(i) As to where covenants are precedent, and where dependent, see Mr. Serjeant Williams's note (4) to 1 Saund. 525.

(k) *Smith v. Woodhouse*, 2 New Rep. 233. See *Havelock v. Geddes*, 10 East, 555.

(l) 8 Term Rep. 370, 371.

(m) See *Duke of St. Alban's v. Shore*, 1 H. Black. 270; *Goodis-*

(I) In *Morris v. Knight*, T. 2 Jac. II. B. R. there were mutual covenants: one agreed to pay a sum of money for a lease for years; the other covenanted that he should enter in twenty days, and that he would make a demise thereof, from &c. and the plaintiff brought an action for non-payment of the money before the demise made, held not good for the lease is the consideration: so judgment for the defendant. MS.

(157) See *Quackenboss v. Lansing*, 6 Johns. Rep. 49. *Barron v. Madan*, 2 Johns. Rep. 145, 148.; and see the opinion of the court in *Cunningham and Morrell*, 10 Johns. Rep. 204. As to dependent and independent covenants, see *Obermyer v. Nichols*, 6 Binn. 159. *Bennet v. Pixley*, 7 Johns. Rep. 249. See further, *McMillan v. Vanderlip*, 12 Johns. Rep. 165. *Jennings v. Camp*, 13 Johns. Rep. 94. *Green v. Reynolds*, 2 Johns. Rep. 207. *Jones v. Gardner*, 10 Johns. Rep. 266. *Gasley v. Price*, 16 Johns. Rep. 267. *Hardin v. Krelsinger*, 17 Johns. Rep. 293. *Robb v. Montgomery*, 20 Johns. Rep. 15.

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If, therefore, either a vendor or vendee wish to compel the other to observe a contract, he immediately makes his part of the agreement precedent ; for he cannot proceed against the other without an actual performance of the agreement on his part, or a tender and refusal(158).

son v. Nunn, 4 Term Rep. 761 ; Glazebrook v. Woodrow, 8 Term Rep. 366 ; and Heard v. Wadham, 1 East, 619 ; and see Amcourt v. Elever, 2 Kel. B. R. 159 ; Carpenter v. Cresswell, 4 Bingh. 409 ; 1 Moo. & P. 66, S. C.

(158) *Ramsay v. Brailsford*, 2 Des. 582. *Green v. Reynolds*, ut supra. *Porter v. Rose*, 12 Johns. Rep. 209.

According to our practice, which is different from the English, the party who is to give the deed has the same drawn at his own expense ; but, under a covenant to convey, he is not bound to prepare the conveyance until the party who is to receive it is in a situation rightfully to demand. And after such demand the grantor is allowed a reasonable time for drawing and executing it ; and he is then to hold it ready for delivery when called for and is in no default until a second demand is made. The purchaser nevertheless may prepare the deed and tender it for execution—and then only one demand is necessary.

The above appears to be the settled law in this state : *Fuller v. Hubbard*, 6 Cowen, 1 ; *Connelly v. Pierce*, 7 Wend. 129 ; Per V. Chan. in *Wells v. Smith*, 2 Edw. C. R. 78. The case cited from Edwards was thus ; Smith covenanted to convey to Wells the land in dispute, free of incumbrance ; and Wells covenanted to build a shop before a specified day ; also a dwelling-house, or instead of it pay \$1000 ; and to execute a bond and mortgage of the house and lot of land. But if he did not pay the 1000 dollars, then the mortgage was to be made for \$3700. The day was specified for Smith to execute her deed. “ But upon this express condition and the agreement between the parties is such that if the said Wells fails or neglects to perform all or any one of the covenants herein before contained on his part, at the time or times herein before limited, then and in such case, all and singular the covenants and agreements on the part of the said Smith shall cease and be absolutely void, and all the right, title and interest of the said Wells in law or equity in the premises shall also cease, and thereupon the said Smith, her heirs and assigns may immediately enter upon the premises and have and hold the same, with the shop, free and discharged from any claims of the said Wells.” Wells failed to perform his covenants as to erecting the house and securing the purchase-money. But the parties subse-

Thus a vendor cannot bring an action for the purchase-money, (*)without having executed the conveyance, or

quently came to an understanding that if Wells would pay Smith the whole of the purchase-money on the day stipulated, the latter would then give the former a deed ; but she at the same time said to the former that if he permitted that day to pass, she should insist on the condition in the agreement. Wells failed in paying the money at the day ; but on the next day he tendered the money and demanded his deed, she refusing to give a deed Wells sues his bill for a specific performance. The V. Chan. considering the agreement a condition precedent, dismissed the bill. The grounds of this decision are stated by our author p. 444, that time was the essence of the contract.—“ Where as in the present case, the vendor requires and the vendee agrees to make it a condition of the contract and they *insert* the same as a distinct and substantive part of the agreement, namely, that a failure or neglect of the purchaser to perform all or any one of his covenants at the time specified (including the payment of the purchase-money on a future day) shall absolutely determine the contract, and the rights of the purchaser shall cease at law and in equity, and the vendor be at liberty to re-enter and hold the property discharged from all claim by the purchaser, it appears impossible to regard it as an unmeaning provision. Nothing can be stronger than the clause in question. It is a naked case of a condition unperformed within time. The distinction is between a condition precedent and subsequent ; and the present is clearly a condition precedent, without any vested right or title. A man enters into a contract or makes a deed of settlement or a will ; and he agrees to grant or devise an estate upon a condition which he declares must be performed before the person to be benefited can take it. But in cases of conditions subsequent it is different: the effect of a breach is to work a forfeiture or divest an estate, the court can interpose upon the principle of compensation to the party and prevent the forfeiture. It was urged that the contract was in effect a mortgage ; but no legal title or estate ever vested in the complainant ; the contract being merely an agreement to convey upon a condition.

In the case of *Lausenbury v. The Protection Ins. Co.* 8 Conn. R. 459, where a policy of insurance provided that if the building should be used for the purpose of storing hazardous goods, &c. the policy should cease and have no effect, held, that this was not a condition precedent ; but must be averred in pleading by way of defence. “ I give to the town of Stoughton, my lot of land in said town, containing eight acres, &c. for the purpose of building a school house, as said town may direct ; provided it is built within 100 rods of the meetinghouse—remain-
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offered to do so, unless the purchaser has discharged him from so doing(*n*); but if the purchaser give a bill of exchange, or other security, for the purchase-money, payable at a certain day, he must pay it when due, and cannot resist the payment even in the case of a bill of exchange, on the ground that there was no consideration for the drawing of the bill, because the seller has refused to convey the estate according to the agreement. But he will have his remedy upon the agreement for the non-execution of the conveyance(*o*).

On the other hand, a purchaser cannot maintain an ac-

(*n*) *Jones v. Barkley*, Dougl. 684; *Philips v. Fielding*, 2 H. Black. 123; and see 3 East, 443.

(*o*) See *Moggridge v. Jones*, 14 East, 486; 3 Camp. Ca. 38; and see *Swan v. Cox*, 1 Marsh. 176; *Spiller v. Westlake*, 2 Barn. & Adolp. 155.

der to the demandants. Although they accepted the donation, they neglected building the house. The Court decided that this was upon a condition subsequent and that the estate vested immediately; but that the town had forfeited the estate by neglecting to comply with the condition in a reasonable time. (*Hayden v. Stoughton*, 5 Pick. 528. 10 ib. 309.) And acceptance of performance after the time has expired by the terms of the contract is *prima facie* evidence of a continuance of the contract in its original terms; but this is open to explanation. *Merrill v. Emery*, 10 Pick. 607. But where an indenture and the estate created by it were to be void and cease; and the right to the landlord to re-enter upon failure to perform the condition in respect to the payment of the rent, The Court Savage C. J., decided that the plaintiff could not sustain his action for the non-payment of rent without showing a demand made of the rent, on the day it fell due, at a convenient time before sun-down. He could not recover under the statute, because there was property on the premises, which might have been distrained. 3 Wend. R. 230.

An instrument which in form imports to be an absolute conveyance, may be determined to be a mortgage, whilst another importing on its face to be a mortgage may be determined to be a conditional sale, according to the intention of the parties, as evinced by testimony *aliunde*.

tion for breach of contract, without having tendered a conveyance, and the purchase-money(*p*).

This last position has, however, been rendered doubtful by some recent *dicta* of the Judges(*q*), that it is incumbent on the *vendor* to prepare and tender a conveyance, which, as a general rule, certainly seems to have prevailed when the simplicity of the common law reigned, and possession was the best evidence of title; but upon modifications of estates being introduced, which were unknown to the common law, and which brought with them all the difficulties which surround modern titles, it became necessary to make an abstract of the numerous instruments relating to the title, for the purpose of submitting it to the purchaser's counsel: and it then became usual for him to prepare the conveyance. This practice (*)has continued, and is now the settled rule of the profession: the rule is, indeed, sometimes departed from, but this seldom happens, except in the country, and it always arises from consent, or express stipulation(159).

(*p*) See 1 Esp. Ca. 191; *ex parte* Hylliard, 1 Atk. 147.

(*q*) Lord Rosslyn, in *Pincke v. Curteis*, 4 Bro. C. C. 332; *Macdonald, C. B.* in *Growsock v. Smith*, 3 Anstr. 877; Lord Kenyon, in *Heard v. Wadham*, 1 East, 627; and Lord Eldon, in *Seton v. Slade*, 7 Ves. jun. 278.

(159) The law in Pennsylvania is different. In *Sweitzer v. Hummel*, 3 S. & R. 228, where the vendor covenanted, that upon payment of the purchase money he would give a title to the purchaser; *held*, that he was bound to prepare and tender the deed of conveyance: 'it is evident,' said the Chief Justice, 'that what may be a very convenient practice in England, may be very inconvenient *here*.' But, if the purchaser deny having made the purchase, without other objection, this was *held*, to dispense with a tender of the deed; for it would be a nugatory act for the vendor to tender a deed, which the purchaser told him he would not accept. *Hampton v. Speckenagle*, 9 ib. 212.

In *Hudson v. Swift*, 20 Johns. 27, it was settled, that to put the vendor in default, and entitle the vendee to recover so much of the purchase money as he had paid in advance, he must tender the residue and

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In a late case(*r*), this point came distinctly before the Court of Exchequer, and it was, in conformity to the pre-

(*r*) *Baxter v. Lewis*, 1 Forrest's Rep. Exch. 61; and see *Martin v. Smith*, 2 Smith, 543; but see *Standley v. Hemmington*, 6 Taunt. 561; 2 Marsh. 276, S. C.

demand a conveyance. And in the subsequent case of *Fuller v. Hubbard et al.* 6 Cowen, 1, where defendants agreed in writing to sell a lot of land to the plaintiff for the consideration of \$600; the sum of \$100 was paid at the time: And the residue was to be paid in three instalments, when a conveyance was to be made in fee, it was held, that the vendee was not entitled to maintain an action on the agreement, with money counts, although he had paid the whole of the purchase money: it being incumbent on him to show that he had demanded a conveyance, and after waiting a reasonable time, he had offered also to receive it.

So, on the other hand, where the consideration money, though payable by instalments, was all due before the vendor sued his action of covenant on the contract; and the breach assigned was the non-payment of the whole consideration money, held, that the plaintiff was bound to declare precisely as though the action had been brought for the last instalment, viz.—must aver a tender of the deed by the plaintiff. The Court, Sutherland, J. said, "The defendant covenanted to pay the plaintiff for the land in three equal annual payments; *'and upon the payment thereof, (the covenant proceeds) I am to receive a good warrantee deed of said land.'*" The payment of the money of the last instalment, and the giving of the deed, were to be concurrent acts. It is well settled that covenants like these are dependent, and that neither party can recover against the other without averring a tender of performance on his part; a mere readiness to perform is not sufficient. If the vendor sues for the consideration money, he must aver a tender of such as by the terms of his contract, he was to give. If the action is brought by the vendee against the vendor for not conveying, he must aver a tender of the consideration money before suit brought. *Johnson v. Wygant*, 11 Wend. R. 48; *S. P. Green v. Reynolds*, 2 Johns. 207; *Jones v. Gardner*, 10 ib. 266, and in *Parker v. Parmele*, 20 ib. 130. In the case last cited, it was held, that the vendor could not recover upon an averment that he was *at the day ready and willing to convey*, but he must allege an absolute tender or offer to convey.

The cases of *Northrup v. Northrup*, 6 Cowen, 296, and *Slocum v. Despard*, 8 Wend., 615, 18, acknowledge the same general doctrine; but the covenants were held to be independent, from the circumstance that the money was to be paid *to a third person, and not to the vendor*;

sent practice of the Profession, decided, that the purchaser, and not the vendor, is bound to prepare and tender the

and that the vendee was of course bound to produce evidence of the payment having been made before the vendor was bound to convey. There, a general averment of readiness on the part of the vendor was held sufficient ; because the circumstance mentioned indicated the understanding of the parties that the payment was to be first made.

In the case of *Brown v. Bellows*, 4 Pick. 179, where the plaintiff sued in *covenant broken* upon an indenture wherein the plaintiff agreed to convey all his right, title, interest, &c. in a certain mill, &c. at the price which should be awarded by certain arbitrators ; and the defendant agreed to pay for the same, on delivery of the deed ; to the performance of which a penalty was annexed ; *held*, that if the plaintiff conveyed by metes and bounds, and made a tender of the deed, it was sufficient, although the deed did not pursue the words of the agreement. The deed was sufficient to pass the property in the grantor's possession, with all his right and title to the same, just as if the words had been inserted. The case, said Putnam J. is like *Martin v. Smith*, 6 East, 555 in principle. The tendering of the deed was a performance, so far as concerned the plaintiff ; and " it is a rule common to all conditions of obligations, that they be taken to be accomplished, when the debtor, who is obliged under such condition, has prevented its accomplishment." 1 Evan's Pothier, 121.

In *Hunt v. Livermore*, 5 Pick. 395, the plaintiff gave the defendant a bond for a deed of certain land ; and the defendant on the same day made his promissory note to the plaintiff for the consideration money, for which the plaintiff acknowledged by receipt, which recited, " but provided the bargain is not carried into effect, I am to deliver up said note upon said Livermore's delivering said bond." The Court held, that the plaintiff was not entitled to an action on the note without showing an offer on his part to give a good deed of the land ; the bond, note and receipt being parts of the same contract.

So, in *Dana v. King*, 2 ib. 155, where the defendant agreed in writing to buy of the plaintiff within a certain time a certain number of shares in the U. S. Bank, and the plaintiff agreed to sell : the price to be paid when the shares should be transferred : *held*, that the plaintiff could not maintain an action for the money, without averring and proving that he had offered to do what belonged to him to perform. And a clause in the agreement providing as to payment of the purchase-money, " which payment and transfer are to be made at any time after one month and within one year as aforesaid, at the option and request of the defendant or his assigns, he or they giving the plaintiff one week's notice to do

conveyance. In the early case of *Webb v. Bettel(s)*, the same rule was expressly recognized by Windham, J. and denied by no one. He said, "that where a person is to execute a conveyance generally, there the counsel of the purchaser is intended to draw it, and then the purchaser ought to tender it.

It is settled, that if a conveyance is to be prepared at the expense of a purchaser, he is bound to tender it(*t*). Now it is admitted on all hands, that the expense of the conveyance must be borne by the purchaser, if there be no express stipulation to the contrary. Therefore, where there is no such stipulation, the purchaser is bound to tender the conveyance.

Upon the whole, notwithstanding the recent *dicta* to the contrary, as the precise point came before the Court of Exchequer, in *Baxter v. Lewis*, and their decision accords with the *uniform practice* of conveyancers, which has always met with the greatest attention in courts of justice(*u*), we may be warranted in saying, that the purchaser, and not the vendor, ought to prepare and tender the conveyance.

(*s*) 1 Lev. 44.

(*t*) *Seward v. Willock*, 5 East, 198.

(*u*) See 2 Atk. 208 ; 1 Term. Rep. 772 ; *Wilmot*, 218.

the same," did not vary the case. "If the defendant did not request the transfer till within a week before the expiration of the year, the plaintiff should then, or perhaps any time before the year expired, have offered to transfer the stock. Not having done that both parties have suffered the contract to die." The case of *Collins v. Gibbs*, is decisive upon this point.

But where a party has performed his contract in part, and has been prevented by inevitable accident from fulfilling, he is entitled to compensation for the part performed, on an implied promise. 4 Pick. 101.

If the purchaser is required by the agreement to prepare (*)the conveyance, it is clear that the vendor may maintain an action, or file a bill, without tendering a conveyance(*x*); and therefore, to prevent all doubt on this point, it seems advisable to stipulate in the agreement or conditions of sale, that the conveyance shall be prepared by, and at the expense of, the purchaser. A purchaser must, however, prepare the conveyance, although it is merely declared that the conveyance shall be at his expense(*y*).

But although a purchaser is expressly required to prepare a conveyance, yet if a bad title be produced, he may maintain an action for recovery of his deposit, without tendering a conveyance(*z*). So where a vendor has, by selling the estate, incapacitated himself from executing a conveyance to the first purchaser, that renders further expense and trouble on his part unnecessary; and he may accordingly sustain an action without tendering a conveyance, or the purchase-money(*a*).

Although a seller's bill for a specific performance be dismissed, yet he may, in general, still bring his action at law for breach of the agreement; and there are instances of sellers recovering damages in such cases. Where the Court refuses its interference, and yet thinks that the seller is entitled to enforce his contract at law, it is usual to add a declaration to the decree, dismissing the bill, that it is without prejudice to the plaintiff's remedy at law. Where such a declaration is not added, equity will restrain the seller from bringing an action in a proper

(*x*) *Hawkins v. Kemp*, 3 East, 410.

(*y*) *Seward v. Willock*, 5 East, 198.

(*z*) *Seward v. Willock*, *ubi sup.*; S. P. ruled by Lord Ellenborough, C. J. in *Lowndes v. Bray*, Sitt. after T. T. 1810.

(*a*) *Knight v. Crockford*, 1 Esp. Ca. 184. See *Duke of St. Alban's v. Shore*, 1 H. Black. 270.

(*248).

case ; for example, where the bill was dismissed because the seller had no title(*b*).

(*)Where a purchaser is let into possession on a treaty for purchase, he does not become tenant to the seller ; and if the seller cannot make a title, it is doubtful whether an action will, under any circumstances, lie against the purchaser. It is settled that the action will not lie where the occupation has not been beneficial to him(*c*), beyond the mere protection from the inclemency of the weather, and if he paid the money, of which the seller might have made interest, although the jury expressly find that the value of the house, during the occupation of the purchaser, exceeds the interest of the money paid, yet the seller cannot recover(*d*) ; for it is impossible to make the rules of law depend on the balance of loss or gain in each transaction : one party must take back his money, and the other take back his house. A contract cannot arise by implication of law, under circumstances, the occurrence of which neither of the parties ever had in their contemplation.

But as the possession is in these cases lawful, being with the assent of the seller, an ejectment will not lie against the purchaser without a demand of possession, and refusal to quit(*e*) ; unless upon possession being given to him, he agreed to quit possession if he should not pay the purchase-money on a given day, or the like ; in which case an ejectment will lie, without notice, on non-performance of his agreement. The agreement operates in

(*b*) *M'Namara v. Arthur*, 2 Ball & Beat. 349.

(*c*) *Hearne v. Tomlin*, Peake's Ca. 192.

(*d*) *Kirtland v. Pounsett*, 2 Taunt. 45.

(*e*) *Doe v. Jackson*, 1 Barn. & Cress. 448 ; *Right v. Beard*, 13 East, 210. See *Hegan v. Johnson*, 2 Taunt. 148 ; *Doe v. Lawder*, 1 Stark. 308 ; *Doe v. Boulton*, 1 Mood. & Malk. 148 ; *Doe v. Waller*, 1 Carr. & Payn. 595.

the same manner as a clause of re-entry on breach of covenant in a lease(*f*)(160).

(*f*) *Doe v. Sayer*, 3 Camp. Ca. 8. The same doctrine is extended to an *agreement* for a lease, *Doe v. Smith*, 6 East, 530 ; *Doe v. Breach*, 6 Esp. Ca. 106.

(160) In Pennsylvania, an action for the purchase-money produces the same fruit as a bill in equity ; for there it is the only resort of carrying the contract into full effect ; permitting the defendant, under the plea of payment, to give in evidence every circumstance which would influence a chancellor on a bill for specific performance. In *Huber v. Burke*, (11 S. & R. 238.) which was debt to recover the penalty in articles of agreement ; and held, that in that action the vendor may go for damages only, and retain the land ; in which case the breach must be assigned exactly in the same way as where he would go for the purchase-money, if that were permitted him. But to permit him, said the Court, Gibson J., to go either for damages or the purchase-money, according to the case he might be able to make out, would involve the absurdity of an arbitrary discretion in the jury, to hold the vendee to the bargain, or absolve him from it, on payment of a compensation in damages ; which it was determined in *Witman v. Ely*, 4 S. & R. 266, they cannot exercise. The vendor ought therefore to count specifically for the purchase-money as such. That may be done in an action of debt, directly on the covenant to pay, by setting out the covenant, performance on his own part, and failure on the part of the vendee, and concluding in the usual form. Debt on covenant may be supported at common law ; but he is not entitled to recover the whole purchase-money, if there be incumbrances remaining ; for the vendee should be in a condition to tender a title, at least before suit brought. Damages, therefore, and not the price of the land, are the legitimate fruit of an action in this form. But in the case of *Cassell v. Cooke*, 8 S. & R. 268, it was held, that a defendant was not entitled to reduce the purchase-money sued for by proof of special damage sustained by reason of the deed not being delivered to him on the day stipulated, without first showing that he offered to pay the purchase money.

The law would seem to be settled in Pennsylvania from the case of *Steinhauer v. Witman*, 1 S. & R. 438 to the present time, that a vendee may avail himself of a defence against paying the purchase-money, founded on defect of title, even where he had accepted of a conveyance with *special warranty only*. And in *Hart v. Porter*, 5 S. & R. 201, it was held, that a defendant who is sued for the purchase-money may de-

A writ of *ne exeat regno* lies against a purchaser (*) who has not paid the purchase-money, upon his threatening to go abroad, if the vendor's title has been accepted(*g*), or there has been a decree for a specific performance after the title has been investigated(*h*). But although the purchaser has taken possession of the property, and received the rents after the delivery of the abstract, yet the writ cannot issue; for unless the Court can make it out to be quite clear that there must be a specific performance, it cannot grant the writ(*i*).

If a man convey his estate to trustees to sell and pay debts, and afterwards file a bill to stop the sale, on the ground that the trustees, by giving shorter notice of the intended sale than was usual, and other circumstances, would materially injure the sale, the Court will not grant an injunction upon the filing of the bill to restrain the sale, although it is sworn that the sale is to be made the next day. It is not one of those cases in which, on account of irreparable injury to the plaintiff, the Court proceeds in this summary way. If the trustees shall be guilty of a

(*g*) *Goodwin v. Clarke*, 2 Dick. 497; and *Anon*, *ibid.* note; see *Jackson v. Petrie*, 10 Ves. jun. 164.

(*h*) *Boehm v. Wood*, 1 Turn. & Russ. 332.

(*i*) *Morris v. M'Neil*, 2 Russ. 604.

send himself on account of a defect in the title, though there be no covenants on which he can have recourse; and in a case where there has been no eviction. Tilghman, C. J. concluded his judgment of the court thus:—"Considering then, that it was decided in *Steinhauer v. Witman*, that a purchaser not having paid his money, may defend himself under a defect of title, where part of his purchase has been evicted, although he has accepted of a conveyance with no more than special warranty, and considering that where there has been no eviction, it would be against equity, to compel payment of the whole purchase-money, for a defective title." It is to be understood, that this opinion is confined to the case of a purchaser who has no covenants on which he can have recourse to the seller. 7 ib. 43.

breach of trust in making the proposed sale, they will be answerable to the plaintiff for the damage sustained(*k*).

Where a man sells an estate for an annuity, without any agreement being made respecting the security to be given for it, he is entitled to have it secured, not only upon the estate, but also by the bond of the purchaser, and a judgment to be entered up against him(*l*). In *Ker v. Clobery*(*m*), which came before the Court upon a petition between the heir and executor, it appeared that the (*)equity of redemption was sold to the mortgagee for the mortgage-money, and a life-annuity to be paid to the seller and his wife, and the survivor of them, but nothing was said as to the mode in which the annuity was to be secured. It was held to be a purchase of the equity of redemption, subject to the annuity, which ought to be charged on the estate. It was an interest reserved by the seller out of the estate.

A purchaser of an estate subject to incumbrances must indemnify the vendor against them, although he did not expressly engage to do so.

Thus a purchaser of a leasehold estate must covenant with the vendor to indemnify him against the rents and covenants in the lease, although he is not required to do so by the agreement for sale(*n*).

So, although a purchaser of an equity of redemption enter into no obligation with the party from whom he purchases, to indemnify him from the mortgage-money, yet equity, if he receives the possession, and has the profits, would, independently of contract, raise upon his conscience an obligation to indemnify the vendor against the personal obligation to pay the mortgage-money; for hav-

(*k*) *Pechell v. Fowler*, 2 Anstr. 550.

(*l*) *Remington v. Deverall*, 2 Anstr. 550.

(*m*) V. C. 27 Mar. 1819, MS.

(*n*) *Pember v. Mathers*, 1 Bro. C. C. 52, *et supra*, p. 38.

(*251)

ing become owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage(o).

And if a purchaser who has not obtained a conveyance sell to another, the second purchaser is, without entering into a covenant, bound to indemnify him against any costs incurred in proceedings for his benefit(p).

If a seller agree to give a real security as an indemnity to a purchaser upon his accepting the title, he will be compelled specifically to perform it, although he has not (*)sufficient real estate, and offers a sufficient security upon personal estate.(q).

It seems that where a mortgagor has agreed to convey his equity of redemption to the mortgagee, the proceedings in an ejectment by the mortgagee cannot be stopped under the 7 Geo. 2, c. 20, for the effect of it would be to strip the mortgagee of his legal title, which might let in a posterior equitable right to the prejudice of the mortgagee, though he should thereafter obtain a decree for the performance of the agreement(r). But the relief will be granted to the mortgagor, where the mortgagee has not taken any steps to complete his contract for the purchase of the equity of redemption(s.)

A purchaser of an estate let to a tenant from year to year may, without a new contract, or any act corresponding to attornment, recover the rent; and nothing would be a good defence in an action brought for it but the fact that he did not know of the sale, and had paid his rent before to his lessor(t). So, if the estate is in lease, the purchas-

(o) See 7 Ves. jun. 337, *per* Lord Eldon; see *Crafts v. Tritton*, 8 Taunt. 365; 2 Moo. 411, S. C.

(p) *Per* Lord Eldon, in *Wood v. Griffith*, 12 Feb. 1818, MS.

(q) *Walker v. Barnes*, 3 Madd. 247.

(r) *Goodtitle v. Pope*, 7 Term Rep. 185.

(s) *Skinner v. Stacy*, 1 Wils. 80.

(t) See 1 Vern. & Scriv. 289; *Birch v. Wright*, 1 Term Rep. 378. See *Lumley v. Reisbeck*, 15 East, 99.

er is entitled to the benefit of covenants entered into by the lessee with the vendor(*u*), and may recover for a breach of the covenants before his time, if he is seized of the reversion during the continuance of the term(*x*); and he may, after notice to the tenant of the conveyance, distrain for rent in arrear(*y*), whether the estate be freehold or leasehold(*I*).

(*u*) See *post*, ch. 13, sect. 1, n. (1).

(*x*) Davis's case, M. T. 42 Geo. III. Woodfall's Land. and Ten. 529, 2d edit.

(*y*) See Moss v. Gallimore, Dougl. 259; Pope v. Biggs, 9 Barn. & Cress. 245; 4 Man. & R. 193, S. C.

(*I*) It was recently proposed to deprive all middle-men, even in England, of the right to distrain for rent in arrear. Thus, suppose a building lease to be granted by John to James for ninety-nine years, at 10*l.* a year; James builds a valuable house, and underlets to Joseph, for forty years, at 100*l.* a year; and Joseph underlets to Jacob, for thirty years, at 120*l.* a year; it is manifest that James has the greatest interest in the property; and, as the law now appears to stand, he can distrain for his rent, notwithstanding the last underlease. This right was proposed to be taken from him, but the measure was dropped.

In support of the measure, it was contended, that none but the original essor is entitled to distrain for rent, according to the law of England; and therefore that, in the case which I have put, James would not be affected by the act; because he would not, as the law now stands, be entitled to distrain. The argument, which was managed with great ingenuity, was rested upon the statute of *quia emptores*, and some passages in Coke upon Littleton. When it is considered, that the right of distress, in the case above supposed, has never been disputed, it will not be matter of surprise, that the attempt to show that the practice is illegal did not succeed. That rent may be distrained for, although fealty is not incident to it, is laid down in Co. Litt. 142, b.; and it seems to be clear, that distress is incident to every rent at common law, where the lessor has a reversion: and that a reversion of a single day is, for this purpose, as operative as a reversion in fee. In the year-book, 14 Edw. III. p. 8. Finchden thought, that if a lessee leased *all* his estate rendering rent, he could not distrain; he had no reversion. In the 2d Edw. IV. p. 11, the very objection was taken, where the lessor had a reversion; because it was only the reversion of a chattel; but it was held, that he had a right

(*) If a person having a right to an estate, purchase it of another person, being ignorant of his own title, equity (*) will compel the vendor to refund the purchase-money, with interest from the time of bringing the bill, although no fraud appear(z)(161).

(z) *Bingham v. Bingham*, 1 Ves. 126. See *Lansdown v. Lansdown*, Mose. 364; *Saunders v. Lord Annesley*, 2 Scho. & Lef. 101; *Leonard v. Leonard*, 2 Ball & Beatty, 171.

to distrain. In Brooke's Abridgment, Distress, case 45, and Rents, case 17, it is laid down, on the authority of this case, that if a man lease for twenty years, and the lessee leases over for ten years, rendering rent, there, if he grant the rent over to another man, he cannot distrain; because he has not the reversion of the term, which gives the right to distrain: contrary, if he had granted to him the *reversion* and the rent. Note the diversity. In *Wade v. Marsh*, Latch, 211, it was held, that the lessor having only a reversion for years, may, by the common law distrain for the rent, by reason of the reversion, which causes privity. These cases appear to be quite decisive. The only difficulty has been to find a case; for the point has not been doubted for centuries. It is to be hoped, therefore, that the right of mesne landlords to distrain for rent will not be violated, on the ground that it depends upon a practice not sanctioned by law, and which ought to be abolished; but if it shall appear, as it is alleged, that the remedy has been the source of great oppression against the tenantry of Ireland, the Legislature will, I confidently hope, extend its protection to so valuable a race of men, as far as may be consistent with a due regard to the rights of landlords: for, as Justice Twisden observed, we must not steal leather to make poor men's shoes.

(161) The case of *Lawrence v. Beaubien*, 2 Bailey's S. C. R. 623, decided that a mistake of law was a ground of relief from the obligations of a contract, by which one party acquired nothing, and the other neither parted with any right, nor suffered any loss, and which *ex aequo et bono* ought not to be binding; and it made no difference, that the parties were fully informed of the *facts*, and the mistake as to the law was reciprocal. But the evidence should show a palpable *mistake*, and not mere *ignorance* of the law. The mere compromise, however, of a doubtful right will not be a ground of setting aside the contract. Johnson, J. said "it was well remarked in *Fletcher v. Tollet*, 5 Ves. 14, that 'ignorance is not mistake.'" In *Shotwell v. Murray*, 1 J. Ch. 512, (*253) (*254)

So where a person sold a remainder expectant upon an estate-tail, and both parties considered that the remainder was unbarred, and it afterwards appeared that a recovery had been suffered before the contract, the purchaser was relieved against a bond which he had given for the purchase-money, and the seller was compelled to repay the interest which he had received^(a). This was a strong decision. The purchaser might have ascertained the fact by search. The Chief Baron laid down some very general propositions. His Lordship said, "that if a person sell an estate, having no interest in it at the time, and takes a bond for securing the payment of the purchase-money, that is certainly a fraud, although both parties

(a) *Hitchcock v. Giddings*, 4 Price, 135.

and *Lyon v. Richmond*, 2 ib. 56, Chancellor Kent seems to have adopted the cases of *Bilbie v. Lumley*, 2 East, 469 and *Brisbane v. Dacres*, 5 Taunt. R. 143, as an authority upon the point, but neither of these cases turned upon the precise point. In the first, the mistake was in relation to a collateral matter; and the last was *judicium red ditum in invitum*. The learned judge after citing *Lansdown v. Lansdown*, Mosely, 364; *Bingham v. Bingham*, 1 Ves. Sen. 126; and the *dicta* of Ch. J. De Grey, 2 Wm. Bl. 825, Lord Mansfield in *Bize v. Dickason*, 1 Term, 286 in support of his position: then proceeded to the case of *Hunt v. Rousmanier*, 8 Wheat. R. 215 in which Chief J. Marshall remarks, that "although we do not find the naked principle, that relief may be granted on account of ignorance of the law asserted in the books, we find no case in which it has been decided, that a plain and acknowledged mistake in law is beyond the reach in equity." And in remarking on the case of *Lansdown v. Lansdown*, he observes, that although objectionable in other respects; "yet, as a case in which relief has been granted on a mistake in law, it cannot be entirely disregarded." And although the case of *Hunt v. Rousmanier* ultimately turned upon another question, see 1 Pet. 1, it shows very clearly the opinion of that great jurist. See the argument of the learned editor of Pothier, 2 Evans Poth., app. 269. "For myself, I have no hesitation in coming to the conclusion, that contracts, founded on a plain and palpable mistake of the law, from a known state of facts, and capable of proof, ought not to be enforced. O'Neill, J. concurred.

should be ignorant of it at the time(b). Suppose I sell an estate innocently, which at the time is actually swept away by a flood, without my knowledge of the fact, am I to be allowed to receive 5,000*l.* and interest, because the conveyance is executed, and a bond given for that sum as the purchase-money, when, in point of fact, I had not an inch of the land so sold to sell(c)?" Both these cases, when they arise, will, it is apprehended, deserve (*)great consideration before they are decided in the purchaser's favor. The decision must be the same, whether the money is actually paid or only secured(d)(I)(162).

(b) But see 2 Cro. 196; 2 Ld. Raym. 1118; 1 T. Rep. 755; 2 Freem. 106; and *post*, ch. 9, s. 6.

(c) See ch. 5, s. 2, *post*.

(d) See *post*, ch. 9, s. 6.

(I) In a late case before Lord Eldon, his Lordship expressed considerable doubt upon the doctrines in the case in the Exchequer.

(162) The principle asserted in the text, seems to rest upon the ground that the maxim *ignorantia juris non excusat*, is applicable only in the administration of criminal law. In *Lansdown v. Lansdown*, cited *ut supra*, the Lord Chancellor says, "That Maxim of law, *ignorantia juris non excusat*, was in regard to the public, that ignorance cannot be pleaded in excuse of crimes, but did not hold in civil cases." See *Levy v. Bank U. S.* 1 Binn. 27, 37. acc. *ut semb.* But a contrary doctrine was held by Chancellor KENT in *Lyon v. Richmond*, 2 Johns. Ch. Rep. 51, 60. "The courts" he says, "do not undertake to relieve parties from their acts and deeds fairly done on a full knowledge of facts, though under a mistake of the law. Every man is to be charged at his peril, with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind." See also, *Shotwell v. Murray*, 1 Johns. Ch. Rep. 516. *Storrs v. Barker*, 6 Johns. Ch. Rep. 166.

In *Haven v. Foster*, 9 Pick 112, where the plaintiff as administrator on an estate paid over to the defendant by mistake of the laws of descent of New York the money sought to be recovered back in this action; held, that he was entitled to recover. The *lex loci rei sitae* must govern the descent of real estate. The parties knew that the intestate died seized of lands in New York. The distribution was governed by

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Where a policy of assurance on a life was sold by auction, and the particulars did not state that the seller had only a redeemable interest in the life assured, and the interest was afterwards redeemed, it was held that after the purchase was completed the purchaser could not recover damages for the fraud, as it was proved that the practice of the office was to pay such policies, although of course there was no legal right to recover under the policy(*e*).

If a lease be granted with power to the lessee to cut and sell the timber, and the lessee is required *when and so often* as he intends to sell the timber, or any part thereof, to give notice to the lessor to whom the pre-emption was given; the lessee having a *bona fide* intention to cut down all the timber, may give a general notice to the lessor, and if the lessor decline to purchase the timber, the lessee may cut it down at intervals, and need not repeat the notice(*f*).

A *bona fide* purchase of an interest will not be converted into a loan, on account of a power to re-purchase being given to the seller, although at an advanced price;

(*e*) *Barber v. Morris*, 2 Mood. & Malk. 62.

(*f*) *Goodtitle v. Saville*, 16 East, 87. See *Doe v. Abel*, 2 Mau. & Selw. 541.

the laws of that state. The statute of New York is a fact, the ignorance of which may be ground of repetition. The defendant received a part of the consideration of these lands by mistake in a matter of fact—the law of New York. The estate in New York was under mortgage; and the mortgage was satisfied from the estate itself. The heirs agreed to pay off the mortgage; and the plaintiff supposing he owned but a quarter, when he owned half made the agreement in respect to the distribution of the proceeds of these lands. The agreement was founded in mistake, but it has been executed, as the parties cannot be restored to the situation they were in when it was made, and as the effect of annulling to one would work injustice to another, we can see no good reason why both should not be bound by it.

but, if the purchaser, instead of taking the risk of the subject of the contract (*e. g.* an annuity) on himself, take a security for repayment of the principal, that will vitiate the transaction, and render it a mere mortgage security(*g*)(163).

(*)If a power to re-purchase be given upon a condition, for example, that rent be in the mean time regularly paid, the right cannot be enforced unless the condition has been complied with, for it is not a stipulation for penalty or forfeiture but a privilege conferred(*h*)(164).

(*g*) *Verner v. Winstanley*, 2 Scho. & Lef. 393. See *Sevier v. Greenway*, 19 Ves. jun. 413.

(*h*) *Davis v. Thomas*, 1 Russ. & Myl. 506.

(163) See *Jackson v. Green*, 4 Johns. Rep. 187. *Erskine v. Townsend*, 2 Mass. Rep. 493.

(164) The principle of this decision was recognized in the late case of *Robinson v. Cropsey and others*, 2 Edward's V. Ch. R. 138, where the question was as to the effect of an agreement. It appeared that one Sharp and the complainant had joined in building a house upon two lots of land. Sharp and wife executed a conveyance of one undivided moiety of said lots; and also of a moiety of two other lots. A consideration was expressed, but not then paid. Subsequently, however, the parties agreed under their hands and seals thus: Sharp was to convey to the complainant the whole of said lots with four other lots, free of incumbrance, except a mortgage, which the latter was to pay:—in consideration whereof the complainant was to cancel an account current; and also certain mortgages he held. Sharp agreed also to lease certain lots for 19 years at a stipulated rent. The agreement also gave to Sharp "the privilege of redeeming said house and lands within one year for a sum therein mentioned. In pursuance of this agreement, Sharp executed a deed conveying the other four lots; and the complainant had been in possession since that time. The question for the court was whether this was a conditional sale or a mere mortgage transaction. The V. Chan. decreed that the defendants, as the representatives of Sharp, had no right to redeem or re-purchase under the the agreement. The grounds of this decision were that the relation of debtor and creditor did not remain by the agreement; but the debt forming the consideration of the conveyance was extinguished by the agreement; and the grantor retained the *privilege* of refunding the money if he should choose to do it. The enquiry, says Chief J. Mar-

(*256)

Where a power is given by an Act of Parliament to purchase the estate of a third person for a public purpose, with the usual provisions for ascertaining its value, if the terms offered are not accepted; the party empowered to purchase, if he give a regular notice to purchase, cannot withdraw from it, but will be compelled to take the estate(i).

It may here be observed, that the grant of the office of a steward of a manor for life is not revoked by a subsequent sale of the manor, but is binding on the purchaser; although, as lord, he will be entitled to the custody of the court-rolls. In purchasing a manor, therefore, the instrument by which the steward was appointed should be called for. This is a precaution which has never been attended to.(165).

(i) The King v. Hungerford Market Company, 1 Nev. & Mann. 112.

shall in Conway's executors v. Alexander, 7 Cranch, 218. must be, whether the contract, in the specific case, is a security for the repayment of money or an actual sale. If a mortgage is intended, the mortgagee must have a remedy against the person of the debtor: if this remedy really exists, its not being reserved in terms will not affect the case; but the remedy must exist, in order to justify a construction which overrules the express words of the instrument." When the mortgages, &c. were cancelled, they were extinguished; and by the agreement went to pay the consideration money.

(165) Parsons Ch. J. "If a grantor deliver any writing *as his deed* to a third person, to be delivered over by him to the grantee on some future event, it is the grantor's deed presently, and the third person is a trustee of it for the grantee. And if the grantee obtain the writing from the trustee before the event happen, it is the deed of the grantor, and he cannot avoid it by the plea of *non est factum*, whether generally or specially pleaded. But if the grantor make a writing and seal it, and deliver it to a third person, as his writing or escrow, to be by him delivered to the grantee, upon some future event, as his the grantor's deed; and it be delivered to the grantee accordingly, it is not the grantor's deed until the second delivery. And if the grantee obtain the possession of it before the event happen, yet it is not the grantor's deed, and he may avoid it by pleading *non est factum*."

But if the deeds are delivered to a person, not as the deeds, but as the writings of the grantor, we must not thence conclude they are void. Although generally an escrow takes its effect from the second delivery, yet there are excepted cases, in which it takes effect, and is considered the deed of the maker, from the first delivery. The exception is founded on necessity, *ut res valeat*. If a *feme sole* seal a writing, and deliver it as an escrow, to be delivered over on condition, and she afterwards marry, and the writing be then delivered over on performance of the condition, it shall be her deed from the first delivery; otherwise her marriage would defeat it. A. delivers a deed, as an escrow, to J. S. to deliver on condition performed, before which it becomes *non compos mentis*: the condition is then performed, and the deed delivered over; it is good, for it shall be A's. deed from the first delivery. Brook's Reading on the st. of limitations, p. 150. Another exception is in 3 Co. 35 b. 36 a. Lessor makes a lease by deed, and delivers it as an escrow, to be delivered over on condition performed, before which lessor dies, and after it is delivered over on condition performed: the lease shall be the deed of the lessor from the first delivery. There is also a strong exception in 5 Co. 85. If a man deliver a bond as an escrow, to be delivered on condition performed, before which the obligor or obligee dies, and the condition is after performed: here there could be no second delivery, yet is it the deed of the obligor from the first delivery, although it was only inchoate: but it shall be deemed consummate by the performance of the condition. Therefore in *Wheelwright v. Wheelwright*, 2 Mass. 447, where the statute authorized any person of full age seized in fee tail of any lands by deed duly executed before two subscribing witnesses, acknowledged and registered as therein provided, for a good and valuable consideration *bona fide* to convey such lands or any part thereof in fee simple to any person capable of taking and holding such estate; and such deed, so made, executed, acknowledged and registered shall bar all estates-tail in such lands, and all remainders and reversions expectant thereon. In this case the deeds were executed and delivered to one Wells, not as the deeds of the grantor, but as his writings or escrows, to be delivered as his deeds by Wells to the grantee on his, the grantor's death. The Court held, that the deeds must take their effect, and be considered as the deeds of the grantor, from the first delivery, the grantor being dead at the second delivery.

What the nature of the delivery was, whether absolute or conditional, and the intentions of the parties were, are questions of *fact* for the jury, to be determined by the evidence. *Hatch v. Hatch*, 9 Mass. 307. In this case, the father about four years before his death, signed, sealed and

acknowledged the writings which were produced at the trial as his deeds, and which purported to be witnessed as deeds delivered. The grantees, who were the sons of the grantor were not privy to the execution; but the writings were deposited with one Turner, to be kept until the grantor's death, and then to be delivered to the grantees; held, that the sons should hold the estate.

In *Clark v. Gifford*, 10 Wend. R. 310, where there was no absolute delivery of the deed; the papers were *deposited* with a third person to be delivered when both parties should direct: held, that one party obtaining possession of a writing thus deposited, without the consent of the other, cannot be permitted to enforce it. "Take these deeds and keep them; if I never call for them, deliver one to Pamela, and the other to Noble after my death; if I call for them, deliver them up to me." The Court held that the reservation of a power to countermand the delivery over made no difference; for it was in the nature of a testamentary disposition of real estate, and was revocable by the grantor during his life, without any express reservation. The legal operation of such a deed is, that it becomes the deed of the grantor presently; that the third person is the trustee of the grantee; but the title is consummate in the grantee by the death of the grantor; and the deed takes effect by relation from the first delivery. *Belden & al. v. Carter*, 4 Day's R. 66.

Weston, J. 3 Greenl. R. 141. "A delivery of a deed may be by acts, or by words; or by both. It may be delivered by the party who made it, or by any other person, by his appointment or authority, precedent or assent subsequent. But if a man throws a writing on a table, and a party takes it, this does not amount to a delivery, unless it be found to have been put there, with intent to be delivered to the party. And upon the same principle, if the maker of a deed avails himself of the hand of the party for whom it is made, merely to put the deed in a trunk, desk or other place of deposit, within the control of the maker, and such purpose is indicated and made known at the time, there is no legal delivery; no act being done, or declaration made expressive of an intention to deliver."

In *Austin v. Hall*, 13 Johns. 285, where the deed was duly executed by the grantor, in his life time, and delivered to a third person, to be delivered to the grantees (sons of the grantor) in case the grantor should die before having made and executed his will. The Court considered it "questionable whether this deed is to be viewed as an *escrow*; the grantees had nothing to do, on their part, in order to make the deed absolute, which is usually the case where a deed is delivered as an *escrow*. The delivery here was, at all events, condi-

tional, and to become absolute upon an event which has taken place ; and, as in the case of an escrow, the deed will take effect from the first delivery.

A deed delivered at the register's office, in the absence of the grantee, has been held to be a good delivery to the grantee ; if he afterwards assent and take the deed. And where the sheriff lodged the deed with the clerk of the court for the use of the purchaser ; he having paid the price ; these proceedings being regular, were held to constitute an incumbrance. *Chapel v. Bull*, 17 Mass. 213. The man who executes a mortgage to the vendor for the payment of the purchase-money, must be presumed to have accepted the conveyance. 14 S. & R. 299.

In *Ward v. Winslow*, 4 Pick. 518, where the defendants, being insolvent made an assignment of their property, in trust to pay creditors. The bill prayed for an execution of the trust ; but the defendants in their answers, admitted the execution of the deeds ; they, however, also said, that the indenture was returned to them to obtain the signatures of the creditors ; for the intent was that it should take effect only when a majority in interest of the creditors had signed it : And having subsequently compounded with their creditors, the deed was annulled. One part was found in the hands of the assignees ; another in the hands of the creditors ; and was referred to in the adjustment which took place between certain of the creditors and the debtors. The Court considered " Where a deed, with the regular evidence of its execution upon the face of it, is found in the hands of the grantee, the presumption is that it has been duly *delivered*. It could not have been delivered as an escrow, because it was delivered to the parties ; an escrow can be delivered only to a third person. It could not have been delivered to the parties conditionally, to take effect upon the happening of any future contingency, because this would be inconsistent with the terms of the instrument itself. To permit parties to a deed purporting to be absolute, to show by parol evidence that it was conditional, and to avoid it for a non-performance of the condition, would be not only a violation of the fundamental rules of evidence, but productive of great injustice and mischief."

(*)CHAPTER V.

OF THE CONSIDERATION.



SECTION I.

Of unreasonable and inadequate Considerations.



I. It seems that a court of equity cannot refuse to assist a vendor merely on account of the price being unreasonable(*a*): and a specific performance will certainly be enforced, if the price was reasonable at the time the contract was made, how disproportionable soever it may afterwards become(166).

If, however, a man be induced to give an unreasonable price for an estate, by the fraud(*b*)(167), or gross misrepresentation(*c*), of the vendor; or by an industrious con-

(*a*) *City of London v. Richmond*, 2 Vern. 421; *Hanger v. Eyles*, 2 Eq. Ca. Ab. 689; *Hicks v. Philips*, Prec. Cha. 575; 21 Vin. Abr. (E), n. to pl. 1; *Keen v. Stukeley*, Gilb. Fq. Rep. 155; 2 Bro. P. C. 396; *Charles v. Andrews*, 9 Mod. 151; *Lewis v. Lord Leechmere*, 10 Mod. 503; *Saville v. Saville*, 1 P. Wms. 745; *Adams v. Weare*, 1 Bro. C. C. 567; and the cases, as to inadequacy of price, cited *infra*.

(*b*) See *James v. Morgan*, 1 Lev. 111, a case at law. *Conway v. Shrimpton*, 5 Bro. P. C. last edit. 187.

(*c*) *Buxton v. Cooper*, 3 Atk. 383.

(166) See *Osgood v. Franklin*, 2 Johns. Ch. Rep. 1, 23. The same case was affirmed on appeal. 14 Johns. Rep. 527.

(167) Fraud will vitiate *any* contract: No rule of law is more universal than this. See *Wilson v. Force*, 6 Johns. Rep. 110.

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cealment of a defect in the estate(*d*), equity will not compel him to perform the contract.

And where these circumstances do not appear, but the estate is a grossly inadequate consideration for the purchase-money, equity will not relieve either party. Thus (*)in a case at the Rolls before Lord Alvanley, by original and cross-bill, the estate was represented on the one hand of the value of 9 or 10,000*l.*; and on the other of only 5,000*l.* The contract was for 6,000*l.*, and 14,000*l.* at the death of a person aged sixty-five. Lord Alvanley said, it was not a case of actual fraud; but it was insisted the bargain was grossly inadequate; and the inadequacy was very great: it was impossible upon the whole evidence to make the estate to be worth more than 10,000*l.*; though he ought not to decree a performance, yet as no advantage was taken of necessity, &c. he was not warranted to decree the vendor to deliver up the contract, the only inconvenience of which would be, that an action would lie for damages; and he accordingly dismissed both bills(*e*).

Indeed few contracts can be enforced in equity where the price is unreasonable, because contracts are not often strictly observed by either party; and if an unreasonable contract be not performed by the vendor, according to the letter in every respect, equity will not compel a performance *in specie*(*f*)(168).

But there are few cases in which a purchaser could be relieved after the conveyance is executed and the purchase completed, on account of the unreasonable price(*g*).

(*d*) Shirley v. Stratton, 1 Bro. C. C. 440.

(*e*) Day v. Newman, 2 Cox, 77; 10 Ves jun. 300, cited; and see Squire v. Baker, 5 Vin. Abr. 549, pl. 12.

(*f*) See the cases cited in n. (*a*), *ante*; and Edwards v. Heather, Sel. Cha. Ca. 3.

(*g*) Small v. Attwood, 1 Yo. Rep. 407.

(168) See *Rugge v. Ellis*, 1 Des. 160.

In *Small v. Attwood*(*h*), where the contract was rescinded; after the decree setting it aside and directing the accounts to be taken, the purchasers filed a supplemental bill, stating the payment of 200,000*l.*, part of the purchase-money (which was paid long before the bill was filed), and tracing the investment of it in stock, and the (*)transfer of the stock to a third person without consideration as it was alleged, and praying that they, without prejudice to their lien on the estate of which they were in possession, might be decreed to be entitled to the specific stock. And Lord Lyndhurst, C. B., so decided, although the money was paid in consideration of the possession of the estate being given to the purchasers, with which they had acted as owners. They had long had possession, which they retained, of the estate, and a lien upon it for what they had paid; and they thus also obtained the property which had been bought with the portion of the purchase-money paid. This is the *first* case in which equity ever followed the purchase-money, and ordered it specifically to be restored. The author refrains from further observing upon this decision, as it is now upon appeal in the House of Lords.

II. It appears to be settled, that mere inadequacy of price is not a sufficient ground for a court of equity to refuse its assistance to a purchaser(*i*), particularly where the estate is sold by auction(*k*)(169).

(*h*) Rep. p. 101.

(*i*) *Coles v. Trecothick*, 9 Ves. jun. 234; *Burrows v. Lock*, 10 Ves. jun. 470. See *Young v. Clark*, Prec. Cha. 538; *Barrett v. Gomeserra*, Bunb. 94; *Underwood v. Hithcox*, 1 Ves. 279; *Mortlock v. Buller*, 10 Ves. jun. 292; and *Lowther v. Lowther*, 13 Ves. jun. 95; *Western v. Russell*, 3 Ves. & Bea. 187.

(*k*) *White v. Damon*, 7 Ves. jun. 30. See *Collet v. Woollaston*, 3 Bro. C. C. 228.

(169) See *Butler v. Haskell*, 4 Des. 651, 678. Wherein the question (*259)

In *White v. Damon*, however, although the estate was sold by auction, Lord Rosslyn dismissed the bill merely on account of the inadequate price given for the estate, viz. 1,120*l.* and it was worth 2,000*l.*; but on a rehearing before Lord Eldon, although the decree was affirmed upon a different ground, yet his Lordship said, he was (*)inclined to say that a sale by auction, no fraud, surprise, &c. cannot be set aside for mere inadequacy of value. It would be very difficult, he said, to sustain sales by auction, if the Court would not specifically perform the agreement. And in a subsequent case(*l*), his Lordship expressed the same opinion, and referred to the case of *White v. Damon*.

But if an uncertain consideration (as a life-annuity) be given for an estate, and the contract be executory, equity it seems will enter into the adequacy of the consideration(*m*).

Although a purchaser is not bound to acquaint the vendor with any latent advantage in the estate(*n*), yet a concealment, for the purpose of obtaining an estate at a grossly inadequate price, may be deemed fraudulent(*170*).

(*l*) *Ex parte Latham*, 7 Ves. jun. 35, note.

(*m*) *Pope v. Root*, 7 Bro. P. C. 184; *Mortimer v. Capper*, 1 Bro. C. C. 156; and *Jackson v. Lever*, 3 Bro. C. C. 605.

(*n*) See 2 Bro. C. C. 423.

as to inadequacy of price is very fully discussed; and where the English decisions are reviewed. Inadequacy of price not a sufficient ground for setting aside a sale; unless it be so gross as of itself to amount to evidence of fraud. *Osgood v. Franklin*, 2 Johns. Ch. Rep. 1, 23. An agreement for the sale of a present interest in a valuable estate, which is executed, will not be set aside on the ground of mere inadequacy of price; there being no fraud, concealment, or misrepresentation. *Gregor v. Duncan*, 2 Des. 636. *Livingston v. Byrne*, on appeal, 11 Johns. Rep. 555.

(170) Equity will relieve against a contract of sale of lands, where the purchaser had discovered salt water on the premises, and in-
(*260)

Thus in the case of *Deane v. Rastron*(*o*), an agreement was made for sale of land at a halfpenny per square yard. The price was in all about 500*l.*, the real value 2,000*l.* The purchaser went out to an attorney, got him to calculate the amount, and desired him not to tell the vendor how little it was; then carried the agreement to the vendor, and prevailed on him to sign it immediately. The Court of Exchequer said, the desire of concealment would be such a fraud as to void the transaction, as parties to a contract are supposed, in equity, to treat for what they think a fair price.

So a misrepresentation by the purchaser, who was the agent of the seller, of the value of the estate, although it operated only to a small extent, has been held to be a (*)sufficient defence against a bill for a specific performance; for to entitle a person to call for the aid of a court of equity, he must go there with clean hands(*p*)(171).

Where neither of the parties knows the value of the estate, at the time the contract is entered into, no inadequacy of consideration will operate as a bar to the aid of equity in favor of the purchaser.

Thus, in a case(*q*) where a common was to be inclosed, one man having a right of common, agreed, before the commissioners had made any allotment, or any one could know what it was to be, to sell his allotment for 20*l.* Af-

(*o*) 1 Anstr. 64; and see *Young v. Clerk*, Prec. Cha. 538; *Lukey v. O'Donnell*, 2 Sch. & Lef. 466.

(*p*) *Cadman v. Horner*, 18 Ves. jun. 10; *Wall v. Stubbs*, 1 Madd. 80.

(*q*) Anon. 1 Bro. C. C. 158; 6 Ves. jun. 24, cited; but see 2 Atk. 134.

dustriously and artfully concealed the fact from the vendor. *Bowman v. Bates*, 2 Bibb, 52. See *Eichelberger's Les. v. Baruitz*, 1 Yeates, 312.

(171) See *Parker v. Carter*, 4 Munf. 288. *Moseley's Exr. v. Buck*, 3 Munf. 233.

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terwards it turned out to be worth 200*l*. Sir Joseph Jekyll said, the contract ought to be enforced, as no one could know what the allotment would be ; and both parties were equally in the dark ; *but it might be different if the circumstances had been known to the plaintiff*.

But, whether an estate is sold by auction, or by private agreement, equity will be as vigilant in discovering an excuse for refusing to perform the contract, where the price is inadequate, as it will where the consideration is unreasonable(*r*).

III. A conveyance executed will not, however, be easily set aside on account of the inadequacy of the consideration ; for there is a great difference between establishing and rescinding an agreement(*s*)(172). It is not sufficient to (*)set aside an agreement in equity, to suggest weakness and indiscretion in one of the parties who has engaged in it ; for supposing it to be in fact a very hard and unconscionable bargain, if a person will enter into it with his eyes open, equity will not relieve him upon this footing only, unless he can show fraud in the party contracting with him, or some undue means made use of to draw him

(*r*) *Whorwood v. Simpson*, 2 Vern. 186 ; *Emery v. Wase*, 5 Ves. jun. 846 ; 8 Ves. jun. 505 ; *Twining v. Morris*, 2 Bro. C. C. 326 ; and see the cases cited in n. (*a*), *supra* ; and see *Mortlock v. Buller*, 10 Ves. jun. 292 ; *Maddeford v. Austwick*, 1 Sim. 89.

(*s*) See *Dews v. Brandt*, Sel. Cha. Ca. 7 ; Cases, *Dom. proc.* 1728 ; *Hamilton v. Clements*, Cas. *Dom. Proc.* 1766. See *Small v. Attwood*, 1 You. 407.

(172) See *Osgood v. Franklin*, 2 Johns. Ch. Rep. 23. In this case, KENT Chancellor, said, " Though inadequacy of price is not a ground for decreeing an agreement to be delivered up, or a sale rescinded, (unless its grossness amount to fraud) yet it may be sufficient, for the court to refuse to enforce performance. It is not an uncommon case for the court to refuse to enforce, for inadequacy, and at the same time refuse to rescind." See *Clitherall v. Ogilvie*, 1 Des. 250, 260. and note, p. 258, 259, 260. See also, *Gregor v. Duncan*, 2 Des. 636.

into such an agreement(*t*). To set aside a conveyance, there must be an inequality so strong, gross and manifest, that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it(*u*). The truth is, that in setting aside contracts, on account of an inadequate consideration, the Court proceeds on fraud. In all such cases, however, the basis must be gross inequality in the contract, otherwise the party selling cannot be said to be in the power of the party buying; unless actual imposition is proved by gross inequality, other circumstances of fraud will pass for nothing; the basis must be gross inequality(*x*)(173).

But a conveyance obtained for an inadequate consideration, from one not conscious of his right, by a person who had notice of such right, will be set aside, although no actual fraud or imposition is proved(*y*)(174).

So if advantage is taken of the distress of the vendor,

(*t*) *Per* Lord Hardwicke, *Willis v. Jernegan*, 2 Atk. 251.

(*u*) *Per* Lord Thurlow in *Gwynne v. Heaton*, 1 Bro. C. C. 1; and see *Stephens v. Bateman*, 1 Bro. C. C. 22; *Floyer v. Sherard*, Amb. 18; *Heathcote v. Paignon*, 2 Bro. C. C. 167, and the cases there cited; *Spratley v. Griffiths*, 2 Bro. C. C. 179, n.; *Low v. Barchard*, 8 Ves. jun. 133; *Underhill v. Horwood*, 10 Ves. jun. 209; 14 Ves. jun. 28; *Verner v. Winstanley*, 2 Scho. & Lef. 393; *Mac Ghee v. Morgan*, *Bruce v. Rogers*, *ib.* 395; *Darley v. Singleton*, 1 Wight. 25; *Evans v. Brown*, *ib.* 102; *Ex parte Thistlewood*, 1 Rose, 290; *Stilwell v. Wilkins*, 1 Jac. 280.

(*x*) *Per* Lord Thurlow in *Gartside v. Isherwood*, 1 Bro. C. C. 558.

(*y*) See *Evans v. Luellyn*, 2 Bro. C. C. 150; and the cases cited in the next note.

(*z*) *Herne v. Meers*, 1 Vern. 465; 1 Bro. C. C. 176, n.; *Gould v. Okenden*, 4 Bro. P. C. by Toml. 193; *Ferguson v. Maitland*, Gro.

(173) See *Gregor v. Duncan*, 2 Des. 636, 639. *Clitherall v. Ogilvie*, 1 Des. 259; and note, p. 258. *Osgood v. Franklin*, 2 Johns. Ch. Rep. 23. *Butler v. Haskell*, 4 Des. 687, 697. See also, *Howell v. Baker*, 4 Johns. Ch. Rep. 118. *Osgood v. Franklin*, 2 Johns. Ch. Rep. 24. *Per* KENT.

(174) See *Butler v. Haskell*, 4 Des. 651, 697.

(*)the sale will be set aside(z) : and this was done in one case, although the purchaser was really run to great hazard, and was to be at great expense and trouble in many foreseen and unavoidable law-suits about the estate, the issue of which was very doubtful(a)(175).

The reader will perceive that in this chapter a distinction is taken between contracts in *feri*, and contracts actually executed ; but in the case of *Coles v. Trecothick*(b), Lord Eldon appears to have been of opinion, that no such distinction exists. His Lordship said, that unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not a sufficient ground *for refusing a specific performance*(176).

IV. In treating of inadequacy of price, we must be careful to distinguish the cases of reversionary interests, the rules respecting which, especially where an heir is the vendor, depend upon principles applicable only to themselves, and not easily definable(c). The heir of a family dealing for an expectancy in that family, shall be distinguished from ordinary cases, and an unconscionable bargain made with him, shall not only be looked upon as oppressive in the particular instance, and therefore

and Rud. of Law and Eq. p. 89, pl. 1 ; *Pickett v. Loggon*, 14 Ves. 215 ; *Murray v. Palmer*, 2 Scho. & Lef. 474.

(a) *Gordon v. Crawford*, before the House of Lords ; Gro. and Rud. of Law and Eq. p. 92, pl. 16 ; Printed Cases *Dom. Proc.* 1730.

(b) 9 Ves. jun. 234 ; *sed. qu.* and see the cases cited in this chapter.

(c) See 9 Ves. jun. 243 ; 2 Pow. Contr. 181 ; 3 Wooddes. 460, s. 7 ; Gilb. Lex Prætor. 291 ; 1 Trea. Eq. c. 11, s. 12, and Mr. Fonblanque's notes, *ibid.*

(175) See *Osgood v. Franklin*, 2 Johns. Ch. Rep. 24. *Per* KENT. *Butler v. Haskell*, 4 Des. 651. *Bunch v. Hurst*, 3 Des. 273.

(176) In *Osgood v. Franklin*, 2 Johns. Ch. Rep. 23. KENT, Chancellor, says, " There is a very important distinction, which runs through the cases, between ordering a contract to be rescinded, and decreeing a specific performance."

avoided, but as pernicious in principle, and therefore (*)repressed(*d*). There are two powerful reasons why sales of reversions by heirs should be discountenanced; the one, that it opens a door to taking an undue advantage of an heir being in distressed and necessitous circumstances(*e*), which may perhaps be deemed a private reason: the other is founded on public policy, in order to prevent an heir from shaking off his father's authority, and feeding his extravagances by disposing of the family estate(*f*). Every case of this nature must, however, depend on its own circumstances; the Courts profess not to lay down any particular rules, lest devices should be framed to evade them(177).

(*d*) *Per* Lord Thurlow, 1 Bro. C. C. 10. -See *Nott v. Hill*, 1 Vern. 167; 2 Vern. 27; *Berney v. Pitt*, 2 Vern. 14; *Earl of Ardglass v. Muschamp*, 1 Vern. 237; *Twisleton v. Griffith*, 1 P. Wms. 310; *Curwyn v. Milner*, 3 P. Wms. 293, n. (C); *Sir John Barnardiston v. Lingood*, 2 Atk. 133; *Baugh v. Price*, 1 Wils. 320; *Gwynne v. Heaton*, 1 Bro. C. C. 1; *Bernal v. Donegal*, 3 Dow, 133; *Blakeney v. Bagott*, 3 Bligh, N. S. 237.

(*e*) *Sir John Barnardiston v. Lingood*, 2 Atk. 133.

(*f*) *Cole v. Gibbons*, 3 P. Wms. 290. See *Barnard. Cha. Rep.* 6.

(177) See *Osgood v. Franklin*, 2 Johns. Ch. Rep. 25. *Butler v. Haskell*, 4 Des. 651, 687.

In *Butler v. Haskell*, 4 Des. 687, 688., DESAUSSURE, Chancellor, says, "there is a distinction made between the cases of young heirs selling expectances, and of others, which I am not disposed to support. It is said, that the former are watched with more jealousy, and more easily set aside than others, on principles of public policy. This was certainly true at first; but the eminent men, who have sat in chancery, have gradually applied the great principles of equity, on which relief is granted, to every case where the dexterity of intelligent men had obtained bargains at an enormous and unconscientious disproportion, from the ignorance, the weakness, or the necessities of others, whether young heirs or not." See *Boynston v. Hubbard*, 7 Mass. Rep. 112.

In *Fitch v. Fitch*, 8 Pick. 480, it was decided that a covenant entered into by an heir expectant, upon a valid consideration and with the consent of the father, to convey the estate which should come to him, was valid. "The Knowledge of the father, and his consent to the transaction is essential to its validity. Though no title passed by the

The circumstance of the heir being unprovided for, will not prevail much in the purchaser's favor : the remoteness or uncertainty of the interest is not material, if the terms be unreasonable, nor can much stress be laid upon the purchaser incurring the risk of the loss of his money, in case the heir die before he come into possession ; nor will the acquiescence of the seller during the continuance of the same situation in which he entered into the contract prejudice him(*g*).

The adequacy of the consideration is considered with reference to the time of the contract and not to the event, and the burden lies on the *purchaser* in these cases to show that a full and adequate consideration was paid(*h*)(178).

(*)A very anxious protection is also extended by equity to persons selling reversionary interests, who are not heirs, although certainly the same reasons do not occur in support of it(*i*).

And although the bargain include property in possession, yet if the bulk of the property is reversionary, the whole contract will be set aside(*k*)(179).

(*g*) *Gowland v. De Faria*, 17 Ves. jun. 20.

(*h*) *Gowland v. De Faria*, *ubi sup*; *Evans v. Griffith*, *Farmer v. Wardell*, 17 Ves. jun. 24. cited ; *Medlicott v. O'Donel*, 1 Ball & Beatty, 136 ; *Kendall v. Beckett*, 2 Russ. & Myl. 88.

(*i*) *Wiseman v. Beake*, 2 Vern. 121 ; *Cole v. Gibbons*, 3 P. Wms. 290.

(*k*) *Lord Portmore v. Taylor*, 4 Sim. 182.

deed made in the life-time of the father, yet the covenant to make further assurances may be valid, if made on good consideration, without undue advantage or oppression taken of the heir, and with the knowledge and consent of the father."

(178) See *Butler v. Haskell*, 4 Des. 698.

In judging of inadequacy of price, reference is to be had to the time of the sale ; "accidental subsequent advantage made of a bargain, is nothing." *Osgood v. Franklin*, 2 Johns. Ch. Rep. 26.

(179) A mortgage to secure against future liabilities, in the absence
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But a *bona fide* sale of a reversionary estate cannot be set aside, whether the vendor be an heir or not(*l*), unless fraud or imposition be expressly proved, or be implied from the inadequacy of the consideration, or other circumstances attending the sale(*m*), although in a late case it was deemed sufficient to avoid the contract(*n*), that the consideration was not equal to the calculated value in the tables. If the bill be delayed for a great length of time(*o*), or the vendor, with full notice of all the circumstances, and of his right to set aside the contract, confirm the purchase(*p*), equity will not relieve against the sale,

(*l*) *Dews v. Brandt*, Sel. Ca. Cha. 8; and see 1 Bro. C. C. 6.

(*m*) *Nicols v. Gould*, 2 Ves. 422; *Gwynne v. Heaton*, 1 Bro. C. C. 1; *Peacock v. Evans*, 16 Ves. jun. 512; *Ryle v. Brown*, 13 Price, 750; *Lord Portmore v. Taylor*, 4 Sim. 182.

(*n*) *Gowland v. De Faria*, 17 Ves. jun. 20. The decision was appealed from, but the suit was compromised by Gowland (the seller) paying the costs and a sum of money to De Faria (the purchaser), beyond the sum decreed to him at the Rolls.

(*o*) *Moth v. Atwood*, 5 Ves. jun. 845; but see *Roche v. O'Brien*, 1 Ball & Beatty, 330.

(*p*) *Cole v. Gibbons*, 3 P. Wms. 290; *Chesterfield v. Janssen*, 1 Atk. 301; 2 Ves. 549. See *Baugh v. Price*, 1 Wils. 320; *Morse v. Royal*, 12 Ves. jun. 355; *Roche v. O'Brien*, 1 Ball & Beatty, 330.

of fraud is valid. Thus in *Hubbard v. Savage*, 8 Conn. R. 215, where the condition of a mortgage deed was "that whereas A. has endorsed for B., a note for 1000 dollars and has agreed to indorse in note or notes, hereafter, when requested—if B. shall well and truly pay said notes according to their tenor, said deed is to be void." Afterwards C. a creditor of B. took security for his debt on the property so mortgaged; but the first mortgage was held to be valid. Daggett, J. In the absence of all fraudulent intention, I am unable to see how a deed given by a man indebted at the time, to secure against future liabilities can be deemed void. It was held valid in *Stoughton v. Pasco*, 5 Conn. R. 442; *Crane v. Deming*, 7 ib. 387. And the doctrine has been recognised in the U. S. C. not only as a security for debts to be contracted, as well as for that already due. *United States v. Hor*, 3 Cranch, 73, 89; 7 Ib. 34, 50.

although the aid of the Court could not originally have been withheld.

Where a sale is set aside on account of the inadequacy (*) of the consideration, it is upon the principle of redemption, and the conveyance will stand as a security for the principal and interest, and even costs(*q*); but compound interest will not be allowed, however long the purchaser has been kept out of his money(*r*); in many cases, therefore, the seller is not merely relieved against the contract, but a considerable benefit is given to him at the expense of the purchaser. In a late case, where interest had been paid on the purchase-money, the payments, were considered to be of principal and not interest, and the seller was charged with interest on all the sums received by him, whether received as interest or as principal(*s*).

So the purchaser will be allowed for lasting and valuable improvements, and will not, like a mortgagee be charged with what without wilful default he might have made(*t*).

The rules on this head have a strong tendency to stop altogether the sale of reversions; but as this is not possible, they must necessarily have the effect of preventing the sale of reversions at their fair market value. It is perfectly well known that reversions upon sales even by auction, fetch on an average only two-thirds of the sum at which they are valued in the tables: according to the

(*q*) *Twisleton v. Griffith*, 1 P. Wms. 310; *Gwynne v. Heaton*, 1 Bro. C. C. 1; *Peacock v. Evans*, 16 Ves. jun. 512; *Bowes v. Heaps*, 3 Ves. & Bea. 117; but in *Nicols v. Gould*, 2 Ves. 423, Lord Hardwicke thought he could not set aside the purchaser without making the purchaser pay costs; and see *Baugh v. Price*, 1 Wils. 320; *Gowland v. De Faria*, 17 Ves. jun. 20; *Morony v. O'Dea*, 1 Ball & Beatty, 109, and the Reporter's note; and *Wood v. Abrey*, 3 Madd. 417.

(*r*) *Gowland v. De Faria*, 17 Ves. jun. 20.

(*s*) *Murray v. Palmer*, 2 Scho. & Lef. 474.

(*t*) S. C.

late case of *Gowland v. De Faria*(*u*), this does not seem (*)to operate in a purchaser's favor, although the value of a thing is at last not to be regulated by calculation, but as it is vulgarly termed, by what it will fetch. Experience has shown, that under the most favorable circumstances, reversions will not fetch their calculated value, which only allows the purchaser five per cent. interest, notwithstanding that his money may be locked up for many years. It seems therefore an equity not founded on reason or convenience, which in these cases inquires the calculated value of the subject of the contract instead of its value according to the well known market price. The effect of such an equity must ultimately be to injure the very persons in whose favor it was introduced. Reversions will never fetch their calculated value. Fair purchasers will not dare to purchase them at their market price, and consequently they will be thrown into the grasp of usurers, who will give very inadequate considerations for them, running the risk of a suit, in which event they will stand in as good a situation as if they had given the fair market price for them.

In a recent case(*x*) Chief Baron Alexander refused to set aside a private sale of a reversionary interest, although Mr. Morgan the actuary's valuation was 928*l.* 8*s.*, and the price paid was only 630*l.*, rather more than two-thirds of the calculated value. The learned Judge could not bring himself to adopt the principle laid down in *Gowland v. De Faria*. He observed, that in the case before him the price agreed on and actually paid was in his opinion the utmost that, according to every human probability, could have been obtained. He did not dispute Mr. Mor-

(*u*) *Supra*, p. 265, and note. See *Ex parte Thistlewood*, 1 Rose, 290; *Lord Portmore v. Taylor*, 4 Sim. 182; *Whichcote v. Bramston*, *ib.* 202, n.

(*x*) *Headen v. Rosher*, 1 M'Clel. & You. 89; but *Hinckman v. Smith*, 3 Russ. 433; *Hilliard v. Gambel*, 1 Toml. 375, n.

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gan's valuation, but the price put by the actuary can never be procured in fact; the witnesses for the defendant (*) prove it, and it requires no witnesses. The price set was the arithmetical value. Now no man will part with his ready money, and all the advantages which the power over it confers, in exchange for a future interest, without some compensation beyond the dry arithmetical value of it. To set this bargain aside would be in effect to decree that no valid bargain for a reversion can be made except by auction; and he did not know how any other sale of such an interest could be sustained, unless Judges proceeded on the same principle as he did. This would be a very inconvenient restraint on the power of the owners of such property. A private sale is no doubt, sometimes, an imprudent exercise of that power; but in many situations, and under circumstances of no unfrequent occurrence, it is wise and provident. Every case should turn on its particular circumstances; and he thought there were none in the present case which, either according to sound sense, or to any established course of precedents, affected it.

In the case of *Potts v. Curtis*(y), the bill was to compel a transfer of some stock, the reversion of which had been purchased by private contract by the plaintiff. The purchase was made in 1812 for 550*l*. The claim was resisted upon the allegation of undue advantage, which was abandoned, and inadequacy of consideration. The plaintiff examined two auctioneers to prove the value. The defendant examined two actuaries, an auctioneer, and a land agent; and in the result the purchaser was supported. This case, for the first time, fairly introduced the question between the conflicting evidence of auctioneers and actuaries, or, in other words, between the market price of reversions, and their estimated value according to the tables. Lord Lynd-

(y) 1 You. 543.

hurst observed, that he had made a calculation as to the (*)inadequacy. If the two calculations of Morgan and Ansell, the actuaries, and the average of their results be taken on the one side, and the calculations of the two witnesses for the plaintiff, and the average of their results be stated on the other side, and then the average of the whole, two on one side, and two on the other, be taken, the result is 597*l.*, that is, 47*l.* more than the price actually paid. There are valuations on the one side, making it 530*l.* and 500*l.*, adding them together, the sum is 1,030*l.*, which divided by two, makes the average 515*l.*, from which one-eighth being taken, in consequence of a mistake, reduces it to 450*l.* Then, on the other side, taking the valuation of Morgan at 855*l.*, and of Ansell at 847*l.*, they make together 1,702*l.*, which divided by two, makes the average 851*l.*, taking one-eighth from which, reduces it to 744*l.*; so that the average on one side, after taking off the eighth, is 744*l.*, and the average on the other side, after deducting the eighth, is 450*l.* Now, adding the 744*l.* to the 450*l.*, they make together 1,194*l.*, and this being divided by two, makes 597*l.*, as the average of the whole, which is just 47*l.* more than the price actually paid. It was quite clear that Sir William Grant, in *Gowland v. De Faria*, paused a moment as to an actuary's valuation; but then, he says, "there is nothing opposed to it; it is not questioned, but it is admitted." He (Lord Lyndhurst) took that as the basis upon which he should proceed. It was equally clear, he seemed to think, a question might arise as to whether an actuary's valuation was the real value. Sir William Alexander in *Headon v. Rosher*, states that the sum at which an actuary values a reversion never can be obtained. He (Lord Lyndhurst) supposed it could not; for why should a party choose to lock up his money at the ordinary interest? Some deduction therefore should be made on that account; but in this case, making no deduction, and taking the valua-

tions (*) on both sides, the average is only 47*l.* more than the money paid for the reversion. It was unnecessary for him to say what was the extent of the inadequacy of consideration which would vitiate a contract of this kind, for it did not appear to him that the consideration was inadequate when the subject was fairly considered. Undoubtedly in this case, Mr. Morgan and Mr. Ansell, who were both actuaries, and accustomed to make calculations of this description with great accuracy, stated that they calculated the value of this reversion at considerably more than the sum that was agreed to be paid for it. This brought him (Lord Lyndhurst) to the consideration of the doctrine in *Gowland v. De Faria*. What is it the Master of the Rolls there says? He says, "The question is, whether he has received an adequate consideration. Upon that question, the evidence is all one way. In many of these cases very opposite opinions are given by calculators; but here Mr. Morgan's opinion is not contradicted; I must therefore take the value to be inadequate; and I do not see how I can avoid setting aside the contract." In that case there was a calculated value; that value was stated by Mr. Morgan; and the Master of the Rolls not finding that calculated value opposed by any evidence, considered he was bound by it; and the calculated value being much more than the sum paid, he considered the contract was altogether void. But he (Lord Lyndhurst) thought the observations made upon that case by Sir William Alexander, very judicious and very proper. He says, "Calculated value is never actual value, and no person selling a reversionary interest can ever expect to get the calculated value." And his reason is extremely good and satisfactory. He says, "The price agreed on and actually paid, was in my opinion the utmost that, according to human probability, could have been obtained. I do not dispute Mr. Morgan's valuation; but the price (*) of an actuary cannot be obtained. The price set was

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an arithmetical value. Now no man will part with his ready money, and all the advantages which the power over it confers, in exchange for a future interest, without some compensation beyond the dry arithmetical value of it." Sir William Alexander, therefore, would have come to the conclusion probably in *Gowland v. De Faria*, that according to his experience, he would not have been bound, as the Master of the Rolls conceived himself to be, by the evidence of the calculated value. The Master of the Rolls thought that the calculated value being opposed by no other evidence, was conclusive upon him. According to his (Lord Lyndhurst's) understanding of the judgment of Sir William Alexander, he would not have considered himself so bound; he would have exercised his own understanding and experience, and made certain deductions from the calculated value; but in the present case they have evidence not merely of the calculated value, but evidence independent of it. Now the evidence of the calculated value of the two most experienced witnesses on the part of the defendant, those on whose judgment he should be disposed most to rely, Mr. Morgan and Mr. Ansell, was, that the calculated value amounted to 744*l.* When he said 744*l.*, that is the average of their valuation, after deducting one-eighth in consequence of their calculation having originally included 2,000*l.*, which it turned out should have been omitted. Their estimated value, therefore, is 744*l.*; two thirds of that sum is 496*l.* only. If you deduct, according to common experience, a third from the calculated value, the proportion to which as the average price obtained(*z*), it would reduce the 744*l.* to 496*l.*, whereas the sum here contracted for amounted to 550*l.* But what (*) was the evidence on the other side? The evidence on the other side, of Mr. Fairbrother, was, that it was not

(*z*) Sug. Vend. & Purch. 239.

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worth to sell more than 530*l.*: the evidence of Mr. Abbott, that it was not worth more than 500*l.* Taking therefore the evidence of Mr. Fairbrother, and the evidence of Mr. Abbott, who were both experienced persons in selling property of this description, and contrasting that with the calculated value, the estimate they put upon the property was something more than two-thirds of the calculated value, and something less than the money actually given for the property. There was another way of considering it, which he had already presented to the parties: he would take Mr. Morgan and Mr. Ansell on one side, and take their average, and then Fairbrother and Abbott on the other side, and take their average, and then taking the average of the two sets of calculators, he found the estimated value upon that average was only 597*l.*, which was only 47*l.* more than the sum actually contracted to be paid.

In a late case(*a*), Sir John Leach held that the rule did not extend to sales by auction. His Honor said, that the principle of the rule could not be applied to sales of reversion by *auktion*. There being no treaty between vendor and purchaser, there can be no opportunity for fraud or imposition on the part of the purchaser. The sale by auction is evidence of the market price. It was said, that pretended sales by auction may be used to cover private bargains; where such cases occur they will operate nothing.

So the same Judge held, that the rule did not apply to a sale by a father, tenant for life, and his son tenant in tail in remainder, for they form a vendor with a present (*)interest, and meet a purchaser with the same advantages as if a single person had the whole power over the estate(*b*).

(*a*) *Shelly v. Nash*, 3 Madd. 232. See *Fox v. Wright*, 6 Madd. 111.

(*b*) *Wood v. Abrey*, 3 Madd. 417.

In *Baker v. Bent*(c), where the bill was filed to set aside for undervalue a sale of a reversion expectant upon the death of a tenant for life without issue male, and subject to charges in other events, the Master of the Rolls said, that the probability that a testator of sixty-three will marry and have issue, depending upon the habits and disposition of the party, and the accidents of life, is not the subject of estimate or calculation, and he put out of his consideration all evidence which affected to set a value on that contingency. But as, in the case before him, the purchaser at the beginning of the treaty was not aware that such a contingency existed, and he put a value upon the plaintiff's interest, as if the reversion were actually to take effect upon the death of the tenant for life; and when he afterwards discovered the contingency he proposed to deduct one half of the sum he had just offered, and that proposal was ultimately the basis of the agreement; the learned Judge referred it to the Master to inquire, what was the value of the reversion, supposing it had been to take effect certainly at the death of the tenant for life, and by declaring that one half of such value is to be deducted in respect of the contingency.

It must not, however, be understood, that because there is a contingency which is not strictly the subject of valuation, a purchaser can sustain a purchase at an undervalue.

It must be remarked, that we have no certain rule by (*)which the inadequacy of a consideration can be ascertained. Our law, indeed, hath in one instance(d) adopted the rule of the civil law; by which no consideration for an estate was deemed inadequate which exceeded

(c) 1 Russ. & Myl. 224; see *Sherwood v. Robins*, 1 Mood. & Malk. 194.

(d) *Vide* *Duke*, 177; *et infra*, ch. 16; and see *Baldwin v. Rochfort*, 2 Ves. 517, cited.

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half the real value of the estate ; and Lord Nottingham wished the rule universally prevailed in England(*e*).

If it be agreed, that the price of an estate shall be fixed by a third person, and such person accordingly name the sum to be paid for the estate, equity will compel a performance *in specie* ; but if the referee do not act fairly, or a valuation be not carefully made, execution of the contract will not be compelled ; especially if there be any other ground upon which the Court can fasten, as a bar to its aid(*f*).

By the civil law, also, a price was considered sufficiently certain, if it was to be fixed by a person named, and such person accordingly fixed the sum : but it appears by the Institutes(*g*), “ *Inter veteres satis abundeque hoc dubitatur, constaretne venditio, an non.*”

Such arbitrators may take the opinion of a third person as evidence, but they cannot merely delegate their authority(*h*).

If an agreement be made to sell at a fair valuation, the Court will execute it although the value is not fixed. For as no particular means of ascertaining the value are pointed out, there is nothing to preclude the Court from adopting any means adapted to that purpose(*i*).

(*) But where parties agree upon a specific mode of valuation, as by two persons, one chosen by each, unless the price is fixed in the way pointed out, the Court cannot enforce the performance of the agreement, for that would

(*e*) See *Nott v. Hill*, 2 Cha. Ca. 120 ; 1 Treat. Eq. 119 ; Grotius *de jure Belli ac Pacis*, L. 2, c. 12, s. 12.

(*f*) *Emery v. Wase*, 5 Ves. jun. 346 ; 8 Ves. jun. 505 ; *Hall v. Warren*, 9 Ves. jun. 605.

(*g*) III. xxiv. 1. For the cases arising out of this rule, *vide* *Vinnius*, 674.

(*h*) *Hopcraft v. Hickman*, 2 Sim. & Stu. 130.

(*i*) See 14 Ves. jun. 407.

be not to execute their agreement, but to make a new one for them. Therefore, where the agreement was to sell at a valuation by arbitrators, to be appointed, or their umpire, and arbitrators were appointed, and differed as to value, and could not agree upon an umpire, the Court refused to interfere(*k*).

In this respect our law accords with the civil law(*l*). The same rule is adopted in the Code Napoleon(*m*). After stating that the price ought to be fixed by the parties, it adds, “Il peut cependant être laissé à l’arbitrage d’un tiers : si le tiers ne veut ou ne peut faire l’estimation, il n’y a point de vente.”

If therefore the medium of arbitration or umpirage is resorted to for settling the terms of a contract, and fails, equity has no jurisdiction to determine that though there is no contract at law, there is a contract in equity:—If the instrument assume that the award shall bind the parties personally, the death of one of them before the award will of course be a countermand of the submission at law, and equity cannot enforce the contract(*n*). So if the arbitrators are named, and one party refuses to execute the arbitration bond, as it is not certain that any award will ever be made, equity will not interfere ; for the relief sought is a specific performance by the defendant conveying (*)at such price as the arbitrators named shall hereafter fix, and no award may ever be made(*o*)(*I*).

This proves that neither of the parties to such an agree-

(*k*) *Milnes v. Gery*, 14 Ves. jun. 400 ; *Gregory v. Mighell*, 18 Ves. jun. 328 ; *Gourlay v. Duke of Somerset*, 19 Ves. jun. 429. See *Cooth v. Jackson*, 6 Ves. jun. 34 ; *Pritchard v. Ovey*, 1 Jac. & Walk. 396.

(*l*) *Vide supra*.

(*m*) Code Civil, Liv. 3, Tit. 6, ch. 1, s. 1592.

(*n*) *Blundell v. Brettargh*, 17 Ves. jun. 232 ; and see 6 Ves. jun. 34.

(*o*) *Wilks v. Davis*, 3 Mer. 507.

(*I*) For the new powers given to arbitrators appointed by rule of Court, or the like, see 3 & 4 W. 4, c. 42, s. 39, 40, 41.

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ment can be compelled to nominate an arbitrator under the agreement. The very point was decided in the late case of *Agar v. Macklew*(*p*). A covenant was contained in a lease that the lessees might purchase the reversion at a valuation by two persons, one to be named by the lessor, and the other by the lessees, who were to name an umpire. The lessor refused to name an arbitrator, and upon demurrer it was held that the lessees could not file a bill for a specific performance, or to compel the lessor to nominate an arbitrator. But a party may bind himself by acquiescing in an award not made in the manner required(*q*). And in a case where the contract of sale was for twenty-five years purchase, on an annual value to be fixed by a certain day, by referees named, and the seller prevented the valuation from being made, it was held that he should not be allowed to avail himself of his own wrong. The Court would compel him to permit the valuation to be made according to the contract(*r*).



(*)SECTION II.

Of the failure of the Consideration before the Conveyance.



I. A VENDEE, being equitable owner of the estate from the time of the contract for sale, must pay the consideration for it, although the estate itself be destroyed between the agreement and the conveyance; and on the other

(*p*) V. C. 9 Nov. 1825, MS.; 2 Sim. & Stu. 154, S. C.

(*q*) See 17 Ves. jun. 241.

(*r*) *Morse v. Marest*, 6 Madd. 26.

hand, he will be entitled to any benefit which may accrue to the estate in the interim(s).

Nevertheless this doctrine, however it may seem to flow from the rules mentioned in the preceding chapter, has never been decided till lately.

For in *Stent v. Baily*(*t*), the Master of the Rolls said, "If I should buy a house, and before such time as by the articles I am to pay for the same the house be burnt down by casualty of fire, I shall not in equity be bound for the house(*u*)."

So upon a sale of a leasehold for lives(*x*), previously to the conveyance, one of the lives dropped; and although Lord Keeper Wright decreed a specific performance, yet the report states, that he seemed to think, that if *all* the lives had been dropped before the conveyance, it might have been another consideration, for that the money was to be paid for the conveyance, and no estate being left, there could be no conveyance.

The case of *Cass v. Rudele*, as it is reported in *Vernon*(*y*), is an authority against the *dictum* of the Master (*) of the Rolls, in *Stent v. Baily*; but it appears(*z*) that the case is mis-stated in *Vernon*, and that the decree was founded on a good title having been conveyed.

In a late case(*a*), however, where *A.* had contracted for the purchase of some houses which were burned down before the conveyance, the loss was holden to fall upon

(*s*) See 2 Pow. on Contracts, 61.

(*t*) 2 P. Wms. 220.

(*u*) As to accidents before the contracts, unknown to the parties, see p. 254.

(*x*) *White v. Nutt*, 1 P. Wms. 62.

(*y*) 2 Vern. 280.

(*z*) See 1 Bro. C. C. 157, n.; and the note to Raith. edit. of *Vernon*.

(*a*) *Paine v. Meller*, 6 Ves. jun. 349; and see *Poole v. Shergold*, 2 Bro. C. C. 118; *Revel v. Hussey*, 2 Ball. & Beatt. 280; *Harford v. Purrier*, 1 Madd. 532.

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him, although the houses were insured at the time of the agreement for sale, and the vendor permitted the insurance to expire without giving notice to the vendee; Lord Eldon being of opinion, that no solid objection could be founded on the mere effect of the accident; because, as the party by the contract became in equity the owner of the premises, they were his to all intents and purposes(I). This decision proceeded on the only principle upon which it can be supported—that the purchaser was in equity owner of the estate. And therefore, in a case where a similar accident happened to an estate sold before a Master, and the report had only been confirmed *nisi*, the loss was holden to fall on the vendor(b): nor does the rule extend to evidence of the title to the property(c).

(*) Lord Eldon's decision in *Paine v. Meller*, exactly accords with the doctrine of the civil law. Indeed this very case is put in the Institutes(d). “*Cum autem emptio et venditio contracta sit, periculum rei venditæ statim ad emptorem pertinet, tametsi adhuc ea res emptori tradita non sit. Itaque si—aut ædes totæ, vel aliqua ex parte,*

(b) *Ex parte Minor*, 11 Ves. jun. 559. Vide p. 60. See *Zagury v. Furnell*, 2 Camp. 240.

(c) *Bryant v. Busk*, 4 Russ. 1.

(d) III. xxiv. 3. Read Puff. *de Jure Naturæ et Gentium*, l. 5, c. 5, s. 3.

(I) In the 2d vol. of Coll. of Decis. p. 56, are the two following cases:—The peril of a house sold, and thereafter burnt, was found to be the buyer's, though the disposition bore an obligation to put the buyer in possession, because the buyer did voluntarily take possession and rebuild the house, and likewise was enfeoffed before the burning. *Hunter v. Wilsons*.—A house bought being burnt, the Lords found, that the property being transferred to the buyer, by his being enfeoffed, and the keys being offered to him, the accidental loss must follow the buyer, although there was a part of the price unpaid, there being a difference about it, which was referred to some friends to be determined, and which they had not done when the burning happened. *Atchison v. Dickson*.

incendio consumptæ fuerint—emptoris damnum est, cui necesse est, licet rem non fuerit nactus, pretium solvere.”

It is hardly necessary to remark, that although the Court will enforce a specific performance, notwithstanding that the estate is destroyed, yet this will not be done unless the title be good, or the purchaser has, previously to the accident, waved any objections to it.

The case of *Paine v. Meller* may be considered as having also settled, that a purchaser would be entitled to any benefit accruing to the estate after the agreement, and before the conveyance; for Lord Eldon said, “If a man had signed a contract for a house upon that land which is now appropriated to the London Docks, and that house was burnt, it would be impossible to say to the purchaser, willing to take the land without the house, because much more valuable on account of this project, that he should not have it.”

This also appears to have been admitted in a case(e) where a man contracted for the purchase of a reversion, and afterwards the lives dropped before the contract was carried into execution; for, although the Court did not decree a specific performance, they proceeded entirely on the laches and trifling conduct of the purchaser, and never even hinted that the contract should not be performed on account of the lives having dropped.

Indeed this point flows from the *decision* in *Paine v. (*)Meller*; and it was the rule of the civil law, that the purchaser should benefit by the accretion to the estate before the conveyance: *nam et commodum ejus esse debet cujus periculum est(f)*.

These cases suggest the observation that, in agreements for the purchase of houses, some provision should be made for their insurance until the completion of the contract.

(e) *Spurrier v. Hancock*, 4 Ves. jun. 667; and see P. Wms. 62.

(f) *Inst. ubi sup.*

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II. It equally follows, from the general rule of equity, by which that which is agreed to be done is considered as actually performed, that if a person agree to give a contingent consideration for an estate, as an annuity for the life of the vendor, and the vendor die before the conveyance is executed, by which event the annuity ceases, yet the purchaser will be entitled to a specific performance of his contract. This, we observe, is a much stronger case than that before discussed. There a loss was actually sustained, and the only question was, upon whom it should fall. But in this case, if performance of the agreement were not compelled, the parties would stand in precisely the same situation as before the contract; whereas, by performing the agreement, the estate is given to the purchaser, without his paying any consideration for it. A steady adherence to principle compels the Court to overlook the hardship of this particular case, and the doctrine rests upon high authority.

Thus in the case of *Mortimer v. Capper*(*g*), *A.* contracted to sell an estate to *B.* for 200*l.* and 50*l.* a year annuity; and two days after the contract was reduced into writing, *A.* was found drowned: the Lord Chancellor directed an inquiry as to the value of an annuity for the life of *A.*, in order to introduce the question, whether an estate (*)being disposed of for an annuity, which is a contingency, the contract shall fall to the ground, if no payment of the annuity shall be made. He said, that he thought, if the price were fair, the contract ought not to be cut down, merely because the annuity, which was a contingent payment, never became payable.

The parties in the above cause were so well satisfied with the opinion of the Court, that they never, it is said, brought it back for further directions(*h*).

(*g*) 1 Bro. C. C. 156. See *Wyvill v. Bishop of Exeter*, 1 Price, 292.

(*h*) See 3 Bro. C. C. 609, *sed qu.*

So in a later case(*i*), where A. sold an estate by auction, in consideration of a life annuity(*l*), the first payment to be made on the 25th of December 1787; but in case he should die before the 29th of September 1787, up to which time he was to receive the rents, the contract should be void. A. died on the 1st of February 1788, after a sudden and short illness of only two days; and owing to some delays, the conveyances were not executed. The quarter's payment, due at Christmas, was tendered to the vendor's agent by the purchaser, a few days after it became due; but the agent declined receiving it, saying, that the conveyance would be soon completed, and that it was not necessary for the purchaser to make such payment in the mean time. On the first hearing, Lord Thurlow said, he did not see that if an annuity was contracted for why the consideration should not be paid. It was, he said, objected, that the contract could not be carried into execution *modo et forma*, and that had great weight where there had been no payment. His Lordship afterwards made his decree for a specific performance, on payment of the arrears of the annuity, the consideration for the purchase of the estate.

(*)The case of *Paine v. Meller* bears on this point also. Lord Eldon, in delivering judgment, said, that as to the annuity cases, and all others, the true answer had been given; that the party has the thing he bought, *though no payment may have been made*; for he bought subject to contingency; and in the later case of *Coles v. Trecothick*, his Lordship expressed the same opinion(*k*).

But if in a case of this nature, a payment of the annuity become due before the death of the vendor, and the pur-

(*i*) *Jackson v. Lever*, 3 Bro. C. C. 605.

(*k*) See 9 Ves. jun. 246.

(*l*) See Appendix, No. 13, for a statement of the new Annuity Act.
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chaser *neglect to make or tender it*, he cannot insist upon a specific performance.

This was decided by the case of *Pope v. Root*(*l*). *A.* contracted with *B.* for the sale of an estate to him, in consideration of a life annuity, and the completion of the agreement was delayed by the illness of a mortgagee, who was to have been paid off. Two days after the time mentioned for completing the purchase, *A.* met with an accident, and died within a few days. By the terms of the contract, the first payment of the annuity became due previously to the death of *A.*, but it was not paid or tendered. And Lord Chancellor Bathurst dismissed the bill for a specific performance, and the decree was affirmed in the House of Lords(*m*), (*l*).

The reader will observe, that the decisions in the cases of *Mortimer v. Capper* and *Jackson v. Lever*, do not infringe upon that of the House of Lords, in the prior case of *Pope v. Root*, but reduce the rules on this subject to an equitable and uniform standard; for the only case in (*) which a purchaser cannot require the assistance of equity, is where he has by laches forfeited his right to its aid, namely, where a payment of the annuity became due, and he neglected to pay or tender it.

To obviate all doubt, it seems advisable in agreements for purchase, where the consideration is an annuity for the life of the vendor, to expressly declare, that the death of the vendor, previously to the completion of the contract, shall not put an end to it, although a payment of the annuity shall not have become due, or having become due,

(*l*) 7 Bro. P. C. 184.

(*m*) See Lord Bathurst's decision in *Baldwin v. Boulter*, 1 Bro. C. C. 156, cited.

(*l*) One writer thought, that the inadequacy of the consideration influenced this decision; see 2 Pow. on Contracts, 76; but it does not appear that any inadequacy was actually proved.

shall not have been made or tendered ; but that, on the contrary, the purchaser shall be entitled to a conveyance, on payment of the annuity up to the death of the vendor.

In the cases just dismissed, the *purchaser*, by the death of the vendor, obtained the estate without paying any, or only a nominal consideration for it. Perhaps a case may arise where the vendor having received the purchase-money, may, by the death of the purchaser, be entitled to retain the estate also, although he may not be his heir. This case was put in the argument of *Burgess v. Wheate*(*n*): a purchase, and the money paid by the purchaser, who dies without heir, before any conveyance. It was said, if the lord could not claim the estate, and pray a conveyance, the vendor would hold the estate he has been paid for, and keep the money too. Sir Thomas Clarke, in delivering his opinion, said, that he thought the lord could not pray the conveyance ; to say he could was begging the question. And as to the vendor's keeping both the estate and the money, it was analogous to what equity does in another case ; as where a conveyance is made (*)prematurely, before money paid, the money is considered as a lien on that estate in the hands of the vendee. So where money was paid prematurely, the money would be considered as a lien on the estate in the hands of the vendor, for the personal representatives of the purchaser ; which would leave things in *statu quo*.

It may be doubted, however, whether this case, if it should ever arise, would be decided according to Sir Thomas Clarke's opinion. Where a lien is raised for purchase-money under the usual equity(*o*), in favor of a vendor, it is for a debt really due to him, and equity merely provides a security for it. But in the case under

(*n*) 1 Blackst. 123.

(*o*) *Vide infra*, ch. 12.

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consideration, equity must not simply give a security for an existing debt; it must first *raise* a debt against the express agreement of the parties. The purchase-money was a debt due to the vendor, which upon principle it would be difficult to make him repay. What power has a court of equity to *rescind* a legal contract like this? The question might perhaps arise if the vendor was *seeking* relief in equity, but in this case he must be a defendant. If it should be admitted that the money cannot be recovered, then of course he must retain the estate also, until some person appear who is by law entitled to require a conveyance of it.

It has been decided that a specific performance will be decreed of a contract for sale of a life annuity, although the annuitant be dead before the bill be filed, provided the contract was a continuing one at his death(*p*). This is the converse of the point decided in *Mortimer v. Capper*, and that line of cases. The Vice-Chancellor (Sir John Leach) observed, that it may now be considered as (*)the settled law of the court, by the cases of *Mortimer v. Capper*, and *Jackson v. Lever*, and the reported *dicta* of Lord Eldon, especially in the case of *Coles v. Trecothick*, that if the price of property be an annuity for the life of the vendor, his death before the conveyance will form no objection to the specific performance of the contract. The vendor agrees to sell for a contingent price, and those who represent him cannot complain that the contingency has turned out unfavorably. The same principle necessarily applies to a case where the life annuity is not the price, but is the subject of the sale. If the annuitant happens to die before the annuity is legally transferred to the purchaser, the death of the annuitant can form no objection to the specific performance of the contract.

(*p*) *Kennedy v. Wenham*, 6 Madd. 355.

(*)CHAPTER VI.

OF THE PARTIAL EXECUTION OF A CONTRACT, WHERE
A VENDOR HAS NOT THE INTEREST WHICH HE PRE-
TENDED TO SELL; AND OF DEFECTS IN THE QUANTITY
AND QUALITY OF THE ESTATE.



SECTION I.

Where the Vendor has not the Interest which he sold.



I. WHERE a person sells an interest, and it appears that the interest which he pretended to sell was not the true one; as, for example, it was for a less number of years than he had contracted to sell, the purchaser may consider the contract at an end, and bring an action for money had and received, to recover any sum of money which he may have paid in part performance of the agreement for the sale: and the vendor offering to make an allowance *pro tanto*, will make no difference; it is sufficient for the plaintiff to say, it is not the interest which I agreed to purchase(a)(181).

(a) *Farrer v. Nightingale*, 2 Esp. Ca. 639; and see *Hearn v. Tomlin*, Peake's Ca. 192; *Thomson v. Miles*, 1 Esp. Ca. 184; *Mattock v. Hunt*, B. R. 15 Feb. 1806; *Hibbert v. Shee*, 1 Campb. Ca. 113. See also *Duffel v. Wilson*, *ib.* 401; and see ch. 8, *infra*.

(181) See *Weaver v. Bentley*, 1 Caines' Rep. 47.; wherein it was held, that the purchaser might maintain *assumpsit* to recover back the purchase money, although the contract was under seal. See also, (*287)

But in a late case(*b*) at *nisi prius*, where the agreement was to sell "the unexpired term of eight years' lease and good will," &c. and it appeared that, at the date of the agreement, the unexpired term in the lease was only seven years and seven months, Lord Ellenborough said, (*)that the parties could not be supposed to have meant that there was the exact term of eight years unexpired, neither more nor less by a single day. The agreement must, therefore, receive a reasonable construction, and it seems not unreasonable that the period mentioned in the agreement should be calculated from the last preceding day when the rent was payable, and including, therefore, the current half year. Any fraud or material misdescription, though unintentional, would vacate the agreement, but the defendant might here have had substantially what he agreed to purchase.

Where a house was sold by auction, and no notice was taken of a fee-farm rent of 5s. 4d. charged upon that and upon other property, to a very great amount, the purchaser brought an action for breach of the agreement, and Sir Vicary Gibbs for the vendor, the defendant, declined arguing the point(*c*).

And where a particular described the subject of sale to be an annuity of so much, payable out of the tolls of Waterloo Bridge, the Court considered that the purchaser would make some inquiry as to the annuity; but as the Bridge Act did not speak of any power to redeem the annuities to be granted, *and the annuity was made subject*

(*b*) *Belworth v. Hapell*, 4 Camp. Ca. 140.

(*c*) *Turner v. Beaurain*, Sitt. Guildh. cor. Lord Ellenborough, C. J. 2d June 1806; and see *Barwell v. Harris*, 1 Taunt. 430.

D'Utrecht v. Melchor, 1 Dall. 428. *Gillet v. Maynard*, 5 Johns. Rep. 85. *Judson v. Wass*, 11 Johns. Rep. 527. *Raymond v. Bearnard*, 12 Johns. Rep. 274. *Putnam v. Westcot*, 19 Johns. Rep. 78. *Lyon v. Annable*, 4 Conn. Rep. 350. *Howes v. Barker*, 3 Johns. Rep. 506.

to redemption, it was held that the contract was not binding on the purchaser; and the Court was of opinion, that sellers should be strictly bound to disclose the real nature of the subject of the contract(*d*).

But, notwithstanding that the vendor has a different interest to what he pretended to sell, equity will, in some cases, compel the purchaser to take it.

Thus, although the estate is charged with trifling incumbrances, which cannot be discharged, yet it seems that, (*)under some circumstances, if a satisfactory indemnity can be given against them, equity will compel a specific performance(*e*)(1)(182). This, however, is evidently a jurisdiction which cannot be too cautiously exercised. In a late case, Lord Eldon said, that he did not apprehend that the Court could compel the purchaser to take an indemnity, or the vendor to give it(*f*)(183).

So, although the vendor may not be entitled to the estate for the number of years which he contracted to sell, yet, if the deficiency were not great, equity would certainly decree a performance of the contract at a proportionable price(*g*).

* (*d*) *Coverley v. Burrell*, M. T. 1821. B. R. MS.

(*e*) *Howland v. Norris*, 1 Cox, 59; *Hasley v. Grant*, *Horniblow v. Shirley*, 13 Ves. jun. 73, 81; see 2 Swanst. 223; and see *Barnwell v. Harris*, 1 Taunt. 430; see also *Hays v. Bailey*, stated in ch. 7. *post*. *Wood v. Bernal*, 19 Ves. 220.

(*f*) See 1 Ves. & Beam. 225.

(*g*) See *Guest v. Homfray*, 5 Ves. jun. 818; and see *Hanger v. Eyles*, 21 Vin. Abr. (A), pl. 1; 2 Eq. Ca. Abr. 689; see also 10 Ves. jun. 306; 13 Ves. jun. 77.

(1) Although it seems evident that this equity would be enforced in a case, for instance, like *Turner v. Beaurain*, yet the cases referred to are not decisive authorities in favor it.

(182) See *King v. Bardeau*, 6 Johns. Ch. Rep. 38. *Ten Broeck v. Livingston*, 1 Johns. Cha. Rep. 357. 363.

(183) See *Boyle v. Rowand*, 3 Des. 555.

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But if the number of years be considerably less than the vendor pretended to sell, equity, so far from interfering in his favor, will assist the purchaser in recovering any deposit which he may have paid.

Thus, in *Long v. Fletcher*(*h*), *A.* pretending he had a term of sixteen years to come, in a house, agreed to sell it to *B.*, and *B.* paid 100*l.*, part of the consideration money, down. *B.* entered, but finding that *A.* had only a term of six years in the house, brought his bill to have an account, his money refunded, and the bargain set aside ; and accordingly *B.* was decreed to account for the profits, and the consideration money to be refunded, and *B.*, upon his own account, to have tenant allowances made him.

So, if a purchaser contract for what is stated to be an (*)original lease, and it turn out to be an under-lease for the whole term, wanting a few days, it should seem that equity would not compel the purchaser to perform the contract. It is impossible, from the nature of the thing, to make any compensation for the reversion outstanding, and yet it may become very valuable ; and it is of great importance to a purchaser of a lease not to have any third person stand between him and the owner of the inheritance(*i*).

It frequently happens that a contract for a leasehold estate is not carried into execution at the time appointed, and the vendor continues in possession. The estate, of course, daily decreases in value, and a question constantly arises, whether the purchaser shall be compelled to pay the full price originally agreed to be given for the estate, or what arrangement shall be made between the parties.

In a modern case(*j*), where this point arose, the

(*h*) 2 Eq. Ca. Abr. 5. pl. 4.

(*i*) *Vide infra*, where an underlease will be enforced against a vendor under an agreement to assign, div. II.

(*j*) *Dyer v. Hargrave*, 10 Ves. jun. 505. See and consider *King v. Wightman*, 1 Anst. 80 ; *Fenton v. Browne*, 14 Ves. jun. 144.

Master of the Rolls said, the reasonable course which he should adopt, was, that for the time elapsed before the execution of the agreement, in consequence of the pendency of the suit, interest should be paid by the purchaser, and a rent should be set upon the premises in respect of the possession of the vendor.

This rule at once provides for the interest of both parties, and accords with the maxim of equity, by which that which is agreed to be done, is considered as actually performed. The purchase-money, from the time of the contract, belongs to the vendor, who is entitled to interest on it while it is retained by the purchaser. The estate from the same time belongs to the purchaser, who is entitled to a rent for it while it is occupied by the vendor.

(*)In *Cuthbert v. Baker*(*k*), the quit rents of a manor were stated in the particulars of sale to be 2*l.* a year, and they amounted to only 30*s.* a year; but a performance in specie was decreed, and it was referred to the Master to ascertain what compensation should be allowed in respect of the deficiency.

And it has been held that quit rents are subjects of compensation, probably because they may be regarded as incidents of tenure(*l*).

Where an estate is sold by auction, or before a Master, in lots, and the vendor has not a title to all the lots sold, equity will compel the purchaser to take the lots to which a title can be made, if they are not complicated with the rest; and will allow him a compensation *pro tanto*.

Thus in *Poole v. Shergold*(*m*), a man became the purchaser of several lots of an estate, to two of which no title could be made. And upon the Master's report Lord

(*k*) Reg. Lib. A. 1790, fol. 442.

(*l*) *Esdaile v. Stephenson*, 1 Sim. & Stu. 122.

(*m*) 2 Bro. C. C. 118; 1 Cox, 273. See 6 Ves. jun. 676.

(*291)

Kenyon said, he must take it for granted, these two lots were not so complicated with the others, as to entitle the purchaser to resist the whole; and therefore decreed a specific performance *pro tanto* (184).

But if a title cannot be made to a lot which is complicated with the rest, the purchaser will not be compelled to accept the lots to which a title can be made.

Thus, in the same case, Lord Kenyon said, if a purchase was made of a mansion-house in one lot, and farms, &c. in others, and no title could be made to the lot containing the mansion-house, it would be a ground to rescind the whole contract.

Lord Kenyon seems afterwards to have gone a step (*)farther, and to have been of opinion, that such a contract ought not in any case to be *enforced* against a purchaser.

For sitting in a court of law(*n*), he held, that the performance of a contract for the sale of some houses ought not to be compelled, as a title could not be made to all the houses bought; and this, notwithstanding they were sold in separate lots. He said, when a party purchases several lots of this description at an auction, it must be taken as an entire contract; that is, that the several lots are purchased with a view of making them a joint concern. The seller, therefore, shall not, in case of any defect in his title to one part, be allowed to abandon that part at his pleasure, and to hold the purchaser to his bargain for the residue. From such a doctrine much injustice might result, as the part to which a seller could not make a title might be so circumstanced, that without it the other parts would be of

(*n*) *Chambers v. Griffiths*, 1 Esp. Ca. 149.

(184) See *Van Eps v. Corporation of Schenectady*, 12 Johns. Rep. 436. *Stoddart v. Smith*, 5 Binn. 355. *Waters v. Travis*, on appeal, 9 Johns. Rep. 450. *Osborne v. Bremar*, 1 Des. 486. See also, *Hepburn v. Auld*, 5 Cranch, 262. *Greenwalt v. Born*, 3 Yeates, 6.

little, perhaps of no value ; or it might leave it in the power of the seller, or any other person who might come to the possession of such part, to deprive the purchaser of every degree of enjoyment or beneficial use of that part which he had purchased. He added, that a case under circumstances precisely similar to the present, had been decided before him, when Master of the Rolls. That, on that case coming before him, he had found that his predecessor there, Sir Thomas Sewell, had ruled contrary to the doctrine he was now delivering ; but that he at the Rolls had overruled Sir Thomas Sewells' determination, with the general approbation of the bar.

And the Court of Exchequer appear to have been of the same opinion as Lord Kenyon. For in a case(o), where a person purchased several lots of an estate sold under a decree of the Court, and the biddings were afterwards opened as to one lot, the Court were of opinion, that (*)he had an option to open the biddings as to the rest of the lots.

In a late case(p), in which most of the authorities on this head were cited, the cases of *Chambers v. Griffiths* and *Boyer v. Blackwell* were not noticed ; but I learn that Lord Eldon afterwards mentioned from the bench that he had met with the case of *Chambers v. Griffiths* ; and he desired it to be understood, that he was not of the same opinion as Lord Kenyon ; and, in a still later case, Lord Eldon expressed an opinion, that Lord Kenyon's rule would not be followed unless it could be shown that there was an understanding that the purchaser was not to take any of the lots unless he could obtain them all(q).

The rules laid down in *Poole v. Shergold* must therefore still be considered the law of the Court. It is indeed re-

(o) *Boyer v. Blackwell*, 3 Anstr. 657.

(p) *Drewe v. Hanson*, 6 Ves. jun. 675.

(q) 16 July 1816, MS. See *Lewin v. Guest*, 1 Russ. 325.

(*293)

markable, that in *Chambers v. Griffiths*, Lord Kenyon should have overlooked his decision in *Poole v. Shergold*; more especially as it in a great measure obviated the objections which he made to a partial execution by a court of equity of a contract for purchase of several lots of an estate. The doctrine, however, could not apply to an action at law, because although the same man purchase several lots at an auction, yet a distinct contract arises upon each(r). *Chambers v. Griffiths* cannot therefore be maintained as an authority even for the legal rule(185).

Where an estate is sold in one lot, either by private contract, or public sale, and the vendor has not a title to the whole estate, he cannot enforce the contract at law(s),

(r) *Emmerson v. Heelis*, 2 Taunt. 38; *James v. Shore*, 1 Stark. 426; see *Baldey v. Parker*, 2 Barn. & Cress. 37; 3 Dowl. & Ry. 220. S. C.

(s) *Tomkins v. White*, 3 Smith, 435.

(185) See *Hepburn v. Auld*, ut supra. *Osborne v. Bremar*, 1 Des. 486. *Van Eps v. Corporation of Schenectady*, 12 Johns. Rep. 436, 443. and 3 Yeates, 8. Nor in equity. See *Hepburn v. Auld*, 5 Cranch, 262, 276. *Butler v. O'Hear*, 1 Des. 382.

In *Croome v. Lediard*, 2 M. & K. R. in Ch. 251, by a written agreement between plaintiff and defendant, the plaintiff agreed to sell and the defendant to purchase, upon the terms stated, the Leigh estate; and by the same agreement the defendant agreed to sell another estate called the Haresfield estate; and eventually the defendant was unable to make a good title to the latter estate: held, that the plaintiff was entitled to a specific performance of the latter contract. But evidence *aliunde* was not admitted to show that the agreement was to take effect on the basis of a mutual exchange. The Lord Chancellor considered the agreements as distinct and wholly independent of each other. This case was distinguished from other cases, such as *Poole v. Shergold*, *Knatchbull v. Grueber*, *Dalby v. Pullen*, *Price v. Price*, *Cassamajor v. Strode*; because there, the question was between a vendor and purchaser, in this case, each party was both buyer and seller. Where two estates are conterminous, or where there was a mixed use and enjoyment of the estates, as in the case of an easement by one party over the property of the other, the contract depending on such a mutuality of purchase and sale might well exist.

unless perhaps a separate value was put on different parts of the estate, in which case the contract in favor of justice (*) may be considered distinct. At law neither a vendor can, on an entire contract, recover part of the purchase-money, where he cannot make a title to the whole estate sold ; nor would a purchaser be suffered in a court of law to say, that he would retain all of which the title was good, and vacate the contract as to the rest : such questions being subjects only for a court of equity(*l*).

But if the part to which the seller has a title was the purchaser's principal object, or equally his object with the part to which a title cannot be made, and is itself an independent subject, and not likely to be injured by the other part, equity will compel the purchaser to take it at a proportionate price ; and in these cases it will be referred to the Master, to inquire, "whether the part to which a title cannot be made, is material to the possession and enjoyment of the rest of the estate(*u*)."

Thus in a case(*x*) before Sir Thomas Sewell, a man who had contracted for the purchase of a house and wharf, was compelled to take the house, although he could not obtain the wharf ; and it appeared that his object was to carry on his business at the wharf(*l*) ; which, Lord Kenyon said, was a determination contrary to all justice and reason(*y*).

(*l*) *Johnson v. Johnson*, 3 Bos. & Pull. 162.

(*u*) *M'Queen v. Farquhar*, 11 Ves. jun. 467 ; Reg. Lib. B. 1804. fol. 1095 ; *Knatchbull v. Grueber*, 1 Madd. 153 ; *Bowyer v. Bright*, 13 Price, 698.

(*x*) See 6 Ves. jun. 678 ; 7 Ves. jun. 270, cited ; and see *M'Queen v. Farquhar*, 11 Ves. jun. 467.

(*y*) 1 Cox, 274.

(*l*) This case has been frequently disapproved of, and would not have been so decided at this day. See 1 Esp. Ca. 152 ; 6 Ves. jun. 679 ; 13 Ves. jun. 78. 228. 427. In *Stewart v. Alliston*, 1 Mer. 26, Lord Eldon expressed himself much more strongly against the principle of these cases, than appears by the report.

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And in the late case of *Drewe v. Hanson*(z), which (*)arose upon the sale of an estate, together with the valuable corn and hay tithes of the whole parish, it appeared, that the principal object of the purchaser was the corn tithes, and that half the hay tithe belonged to the vicar, and the other half was commuted for by a payment of 2*l.* per annum, the nature of which did not appear. Upon the facts, as they then appeared, Lord Eldon would not give judgment, but he seemed clearly of opinion that the hay tithe, if not of great extent *or of such a nature as to prejudice the corn tithe*, was a subject for compensation: but otherwise not, as the purchaser would not get the thing which was the principal object of his contract(a).

In a case(b) often cited, where a man had articted for the purchase of an estate tithe-free, but which afterwards appeared to be subject to tithes, Lord Thurlow, it was said, decreed a specific performance, although the purchaser proved, that his object was to buy an estate tithe-free. This, however, to use Lord Eldon's words(c), is a prodigious strong measure in a court of equity to say as a discreet exercise of its jurisdiction, that the contract shall be performed, the defendant swearing and positively proving that he would have had nothing to do with the estate if not tithe-free. But it now appears from the report of the case, published by Mr. Cox, that the estate was subject only to a money-payment of 14*l.*

(z) 6 Ves. jun. 675.

(a) See *Vancouver v. Bliss*, 11 Ves. jun. 458; *Stapylton v. Scott*, 13 Ves. jun. 425.

(b) Lord Stanhope's case, 6 Ves. jun. 678, cited; *Lowndes v. Lane*, 2 Cox, 363; 6 Ves. jun. 676, cited; but see *Pincke v. Curteis*, cited *ibid.*; and see *Rose v. Calland*, 5 Ves. jun. 186; *Wallinger v. Hilbert*, 1 Mer. 104.

(c) See 6 Ves. jun. 679; and see 17 Ves. jun. 280.

in lieu of tithes(*d*). And in the case of *Ker v. Clobery*(*)(*e*), where the estate was sold before the Master, and the particulars stated, that "the whole of the above lands are only subject to a modus for tithe hay of 2*l.* per annum," Lord Eldon was of opinion, that a purchaser of an estate stated to be tithe-free, or subject to a modus, could not be compelled to take it with a compensation, if the estate is not tithe-free. His Lordship said, that he had so decided in a case from Yorkshire, in which he had told the purchaser, if he would take the estate with a compensation, he must undertake to pay the tithes to the vendor. The question therefore is now at rest(186).

Where an estate is sold tithe-free, the question whether tithe-free is not a question of title but of fact: if the sale was of lands and of tithes, then the matter of tithe would be matter of title(*f*).

In a late case, upon a sale before a Master, where the particular stated *about* thirty-three acres to be tithe-free, Lord Eldon held, that the principle laid down in *Ker v. Clobery* did not apply(*g*).

In a case, where the estate was described as let on a *ground-lease* at so much per annum, and it turned out that the lease was at rack-rent, Lord Eldon would not support the sale, although there was the usual clause, that errors or mis-statements should not annul the sale(*h*). So when the house was described as brick built, although

(*d*) *Howland v. Norris*, 1 Cox, 59.

(*e*) 26 Mar. 1814, MS.

(*f*) *Smith v. Lloyd*, 2 Swanst. 224, n.

(*g*) *Binks v. Lord Rokeby*, E. T. 1818. MS.; S. C. 2 Swanst. 222; and see *Smith v. Tolcher*, 4 Russ. 302.

(*h*) *Stewart v. Alliston*, 1 Mer. 26.

(186) See *Waters v. Travis*, 9 Johns. Rep. 450, 465. on appeal. *Stoddart v. Smith*, 5 Binn. 355. *Greenwalt v. Born*, 3 Yeates, 6.

(*296)

in part built of lath and plaster, and there was no party wall; the same result followed(i).

Where the particular described the estate as four hundred and twelve acres, two hundred and twenty-seven of (*)which were tithe-free, paying a very small modus; and it appeared that part of the estate represented to be tithe-free was subject to tithes which the owner was willing to sell, Lord Eldon, said, that the allegation was, that two hundred and twenty-seven acres "are tithe-free, paying a very small modus," not stating a positive exemption from tithes; and where the contract is to sell an estate tithe-free, the vendor not representing himself to have title to the tithes, without entering into the question, whether the purchaser ought to be compelled to take it if not tithe-free; yet, if he chooses to take it, he cannot compel the vendor to buy the tithes, if there is a positive title to them in pernanacy; all he can have is compensation(k)(187).

If a purchaser, with notice of a defect in a title to a part of the estate which is complicated with the rest, or which is the principal object of his contract, take possession of the estate, and prevent the vendor from making a title, he will be compelled to perform the contract, notwithstanding that he insisted upon the objection at the time he entered(l). A deduction from the price will, however, be allowed him, although the situation of the land will not perhaps be taken into consideration.

A purchaser will not be compelled to take an undivided part of the estate contracted for. Therefore, if a man contract with tenants in common for the purchase of their

(i) *Powell v. Double*, MS. *supra*, p. 42.

(k) *Todd v. Gee*, 17 Ves. jun. 273; *qu.* how is the compensation to be estimated? See *Ker v. Clobery*, *supra*.

(l) See *Calcraft v. Roebuck*, 1 Ves. jun. 221.

(187) See *Wainwright v. Read*, 1 Des. 573.

estate, and one of them die, the survivors cannot compel the purchaser to take their shares, unless he can obtain the share of the deceased.

And in a case where under a decree a person purchased two sevenths of an estate in one lot, and a good title was only made to one seventh, the purchaser was (*)allowed to rescind the contract as to the whole of the lot(*m*).

Nor will a purchaser be compelled to take a leasehold estate, for however long a term it may be holden, where he has contracted for a freehold(*I*). Lord Alvanley expressed a clear opinion on this point(*n*); and it has since been expressly determined by Sir William Grant, in a case(*o*) where the vendor was entitled to a term of four thousand years, vested in a trustee for him, and also to a mortgage of the reversion in fee expectant upon the term which was vested in himself and forfeited, but not foreclosed. The person claiming under the mortgagor of the reversion refused to release, and thereupon the bill was dismissed.

Neither is a purchaser compellable to accept a copyhold estate in lieu of a freehold(*p*)(*II*).

(*m*) *Roffey v. Shallcross*, 4 Madd. 227; *Dalby v. Pullen*, 3 Sim. 29.

(*n*) See 2 Bro. C. C. 497; 1 Ves. jun. 226.

(*o*) *Drewe v. Corp*, 9 Ves. jun. 368; Lib. Reg. 1803, fol. 290. The registrar's book appears to have been again referred to for this case, 1 Sim. & Stu. 201, n; and see 13 Ves. jun. 78.

(*p*) See *Twining v. Morrice*, 2 Bro. C. C. 326; and *Sir Harry Hick v. Phillips*, Prec. Cha. 575.

(*I*) As to making a title by a feoffment, and assigning the term to a trustee, see *Saunders v. Lord Annesley*, 2 Scho. & Lef. 73. *Doe v. Lynes*, 3 Barn & Cress. 388; 5 Dowl. & Ryl. 160, S. C.

(*II*) In the case of *Sir Harry Hick v. Phillips*, on account of the unreasonable price at which the estate was sold, a specific performance was refused, although the vendor offered to procure an enfranchisement of the copyholds. See 10 Mod. 504. But this case cannot be con-

But if an estate is sold as copyhold, and represented as equal in value to freehold, it seems that the vendor will be compelled to perform the contract, although the estate (*)prove to be actually freehold(*q*). If, however, the contract for the sale of a supposed copyhold, stipulate that the sale shall be void if any part is freehold, the subject must be proved as described; and the circumstance of the seller himself, after the first contract, selling the estate to another as copyhold, is not conclusive evidence against him(*r*).

So it is said, that a purchaser of an existing lease is not bound to take a new lease instead of the old one, because the purchaser would become an original lessee, instead of an assignee; and might therefore be subject to burdens, to which he would not have been liable in the latter character(*s*).

It need hardly be observed, that if the estate be sold as in possession, the purchaser cannot be compelled to take it if it is subject to a lease for life(*t*), or indeed any lease.

If a vendee proceed in the treaty for purchase after he is acquainted with the nature of the tenure, and do not object to it, he will be bound to complete his contract, and cannot claim any compensation on account of the difference in value.

Thus, where an estate was sold as freehold, with a leasehold adjoining(*u*), and it turned out on examination

(*q*) *Twining v. Morrice*, 2 Bro. C. C. 326; and see *Browne v. Fenton*, *sup.* p. 3.

(*r*) *Daniels v. Davison*, 16 Ves. jun. 249.

(*s*) *Mason v. Corder*, 2 Marsh. 332.

(*t*) *Collier v. Jenkins*, 1 You. 295.

(*u*) *Fordyce v. Ford*, 4 Bro. C. C. 494; and see 6 Ves. jun. 670; 10 Ves. jun. 508; *Burnell v. Brown*, 1 Jac. & Walk. 168.

sidered as an authority, except on the ground of the price being unreasonable, for equity will in ordinary cases grant the vendor time to procure the fee. See *infra*, ch. 8.

that sixty-two acres were leasehold, and only eight freehold; yet, as the purchaser proceeded in the treaty after he was in possession of this fact, and did not object to the nature of the property, he was held to have waved the objection.

(*) And if a purchaser do object to the tenure, yet, if he proceed in the treaty, it seems that he will be compelled to take the estate, on being allowed a compensation(*x*).

In the case of *Wirdman v. Kent*(*y*), upon a bill filed by vendors for a specific performance, it appeared that part of the lands sold to the purchaser had been previously sold to one Pavey; a specific performance was however decreed, and, as to the lands terrièred to the defendant, but which had been sold to Pavey, that the plaintiffs should procure Pavey to release them to the defendant, *or convey a like quantity of land of equal value to the defendant.*

The particular circumstances of this case do not appear in the report; but it must be presumed, that the land sold to Pavey was not the object of the purchaser; and that other land in the neighborhood, of equal value, would suit him as well. Indeed, in one report of this case(*z*), it is said, that the grievances complained of were disregarded as frivolous.

To guard against the rules established by the foregoing decisions, an express declaration should be inserted in all agreements for purchase of estates, that if a title cannot be made to the whole estate, the purchaser shall not be bound to perform the contract *pro tanto*; and a similar provision should be made where an estate is bought free from tithes, or with any other collateral benefit, which the purchaser may wish to secure.

(*x*) See *Calcraft v. Roebuck*, 1 Ves. jun. 221.

(*y*) 1 Bro. C. C. 140.

(*z*) 2 Dick. 594.

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There may be some rights in an estate not disclosed, which, although in themselves of small value, are incapable of compensation; for example, a right of sporting reserved over the estate, and not disclosed to the purchaser; for it would not perhaps be possible to estimate (*) what difference in value such a reservation made (a); and such a right would break in too much upon the enjoyment and ownership of a purchaser, to enable equity with propriety to compel him to take the estate with a compensation.

II. Having considered in what cases a *vendor* may *compel* a performance *pro tanto* of an agreement, which he is unable wholly to perform; we may now inquire in what instances a *purchaser* may insist upon a part performance of an agreement, which the vendor cannot execute *in toto*.

And first, it seems that in every case where an agreement would be in part executed in favor of a vendor, there is much greater reason to afford the aid of the Court at the suit of the purchaser, if he be desirous of taking the part to which a title can be made. And a purchaser may, in some cases, insist upon having the part of an estate to which a title is produced, although the vendor could not compel him to purchase it: it is true, generally, *but not universally*, that a purchaser may take what he can get, with compensation for what he cannot have (b).

Thus we have seen, that if tenants in common contract for the sale of their estate, and one of them die, the survivors cannot compel the purchaser to take their shares, unless he can obtain the shares of the deceased. But the

(a) *Burnell v. Brown*, 1 Jac. & Walk. 168.

(b) 1 Ves. & Beam. 358, *per* Lord Eldon; *Western v. Russell*, 3 Ves. & Beam. 187; *Wheatley v. Slade*, 4 Sim. 126.

converse of this proposition does not hold; for the purchaser may compel the survivors to convey their shares, although the contract cannot be executed against the heir of the deceased(c). So even where a vendor has (*)not a title to a part of the estate, and consequently cannot enforce the acceptance of it, yet the purchaser may elect to take it with the title such as it is(d). But a purchaser has no such right where there is a stipulation that the contract shall be void if the purchaser's counsel is of opinion that a good title cannot be made to the estate(e).

If a man, having partial interests in an estate, chooses to enter into a contract, representing it, and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety; and therefore the purchaser shall not have the benefit of the contract. For the person contracting under these circumstances is bound by the assertion in his contract: and if the vendee chooses to take as much as he can have, he has a right to that, and an abatement(f).

Therefore in a case where the estate was sold for twenty-one years, and represented as held under a church lease, usually renewed every seven years, and it appeared that the seller was only entitled for life to part; the purchaser filed a bill for a specific performance with a reduction. The seller insisted that the purchaser might have an option to put an end to the contract, but that he (the seller) ought not to be compelled to take less than the stipulated price. The decree, however, was for a specific performance, with a reduction of the purchase-money, the interest of the seller being less valuable than it had been repre-

(c) Attorney-general v. Gower, 1 Ves. 218.

(d) *Vide infra*.

(e) Williams v. Edwards, 2 Sim. 78.

(f) *Per* Lord Eldon, 10 Ves. jun. 31, 516. The same doctrine was laid down by his Lordship in Wood v. Griffith, 12 Feb. 1818; and see 2 Ves. jun. 439, acc. *per* Lord Rosslyn.

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sented to the purchaser(*g*). Lord Eldon has since observed, that the consequence of this decision was, that if the lives should endure beyond the period of twenty-one years, the (*)purchaser would have the premises as well as the compensation. In that respect the case was new, and deserved great consideration. The Lord Chancellor added, that in a conversation which he had with the Master of the Rolls, they inclined to think it might be right upon this reasoning, that the estate was purchased subject to a contingency affecting its immediate value ; he could not carry it to market, he could do nothing with it that would make it absolute property in him as if he had an absolute term of twenty-one years ; but as the compensation might be aggravated enormously, beyond the actual value, so it might be much too small, and the Court would throw the chances together. The only other course was to adopt the principle of indemnity, either by taking security, or laying hold of part of the purchase-money, with a view to compensation if the case should arise, and that was open to this difficulty, that the property held subject to the question of indemnity remains unsaleable, unmarketable, and of infinitely less value than it would otherwise be.

In a later case(*h*), upon a sale of leasehold for lives, the representation of the seller was held to amount to this : that the lessee thereof upon lives, under a church lease, granted the lease in question, with covenants, binding his real and personal representatives to procure renewals to make the complete term sold. It appeared, however, that the covenant to renew was limited, and not binding to the extent mentioned, the estate being in settlement, and the covenants not general. The *purchaser* filed a bill for a specific performance, with an allowance. In effect the difference was between a cove-

(*g*) *Dale v. Lister*, 16 Ves. jun. 7, cited.

(*h*) *Milligan v. Cooke*, 16 Ves. jun. 1.

nant by the lessor binding all his assets real and personal, and a covenant which only bound that property which (*)the lessor might permit to go from him to his son, who would be entitled to the property under the settlement. Lord Eldon felt great doubt whether that could be made the subject of a valuation. The purchaser, however, only desired an indemnity upon a real estate; or by part of the purchase-money to be kept in Court, the sellers receiving the dividends. The Lord Chancellor decreed a specific performance, and directed an inquiry what was the difference between the value of the interest actually sold, and that represented, and such difference to be deducted from the purchase-money; and if the Master should find that he was unable to ascertain such difference in value, or if the purchaser should choose to take the title with a sufficient indemnity, he might, and the decree was affirmed upon a rehearing.

But the general rule, independently of special circumstances, is, that the Court can neither compel a purchaser to take an indemnity nor a vendor to give it(*i*)(190).

Although a purchaser may in most cases insist upon taking the interest which the vendor can give him, yet it seems that equity will not decree an under-lease on an agreement to assign, though it appear that the assignment cannot be made without a forfeiture; for the defendant, in agreeing to assign, might intend to discharge himself from covenants to which he would continue liable by the under-lease(*k*). This is, however, a defence which a

(*i*) 1 Ves. & Beam. 255; *vide post*, ch. 7; *Paton v. Brebner*, 1 Bligh, 66.

(*k*) *Anon. E. T.* 1790; *Fonbl. n. (r)*, to 1 Trea. Eq. 211, 2 edit. See *Mason v. Corder*, 2 Marsh. 332.

(190) See *Hapburn v. Auld*, 5 Cranch, 262. See also the opinion of SPENCER, J. in *Waters v. Travis*, 9 Johns. Rep. 464, 465. See also, *Chinn v. Heale*, 1 Munf. 63. *M'Connell's Heirs v. Dunlap's Dev. Hardin*, 41.

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vendor can seldom set up against a purchaser's claim, where the purchaser chooses to accept an under-lease; for an assignee of a lease almost invariably covenants to indemnify his vendor from the rent and covenants in the (*)lease, and from these covenants he cannot of course discharge himself by an assignment, any more than by an under-lease.

So it has been determined by Lord Redesdale, that where, at the time of the contract, the purchaser is fully aware that the vendor cannot execute the agreement, and, consequently, cannot enforce the performance of it; there the agreement must be presumed to have been executed under a mistake, and the purchaser cannot insist upon a performance as to the interest to which the vendor may be actually entitled(*l*).

And in a case where a tenant for life, with a power of leasing for twenty-one years at a rack-rent, agreed to execute a lease for twenty-one years, and a further lease for twenty-one years at any time during his life, consequently to execute a lease for twenty-one years, whatever might be the increased value of the property at the time the lease should be granted; Lord Redesdale considered it a contract to act in fraud of the power, and that the lessee was not entitled to a specific performance. To obviate this objection, the lessee offered to take a renewed lease for twenty-one years, if the lessor should so long live; but Lord Redesdale thought that this was one of those cases where the plaintiff had no right thus to qualify the contract he insisted upon: there was nothing in the case to show that satisfaction in the form of damages was not an adequate remedy for him. If he had been put into a situation from which he could not extricate himself, the defendant might be called on to make the best title in his power, but nothing could be

(*l*) *Lawrenson v. Butler*, 1 Scho. & Lef. 13; see *Mortlock v. Buller*, 19 Ves. jun. 292.

more mischievous than to permit a person who knows (*)that another has only a limited power, to enter into a contract with that other person, which, if executed, would be a fraud on the power, and when that was objected to, to say, "I will take the best you can give me." A court of equity ought to say, to persons coming before it in such a way, "make the best of your case with a jury"(m)(191).

It should be observed that there was another point in the above cause, and the decree was pronounced after considerable doubts. It seems difficult to reconcile the opinion expressed by Lord Redesdale with the current of authorities. It was not a necessary consequence of the contract that the lease agreed to be granted would be a fraud on the power, and the purchaser was willing to take the interest which the seller was enabled to grant without risk to himself or injury to the remainder-men.

If in a case of this nature, the purchaser, on the faith of the agreement, put himself in a situation from which he cannot extricate himself, and is therefore willing to forego a part of his agreement, that is a circumstance to induce a court of equity to give relief. Thus, in a case before Lord Thurlow, the incumbent of a living had, with full knowledge of the title, contracted with the tenant in tail, in remainder after a life estate, for the purchase of the advowson, and on the faith of that agreement had built a much better house than he would otherwise have done; the tenant for life would not join in suffering a recovery, and consequently a good title could not be made. Lord Thurlow held, that as the purchaser had, upon the faith of the contract, built a good house on the glebe, he ought to have the utmost the vendor could give him; and therefore directed the vendor to

(m) *Harnet v. Yielding*, 2 Scho. & Lef. 549; *vide supra*, p. 209.

(191) See *Graham v. Hendren*, 5 Munf. 183.

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(*)convey a base fee, by levying a fine with a covenant to suffer a recovery whenever he should be enabled to do so by the death of the tenant for life(*n*).

If the vendor has granted a lease of the estate which is void by force of a statute, the Court will not, on the request of the purchaser, consider the lease as valid, and allow him a compensation in respect of it(*o*).



SECTION II.

Of Defects in the Quality of the Estate.



IN most cases on this head, the rule "*caveat emptor*" applies, and therefore, although there be defects in the estate, yet, if they are patent, the purchaser can have no relief(*p*)(192).

(*n*) Lord Bollingbroke's case, cited 1 Scho. & Lef. 19, n. (*a*).

(*o*) *Morris v. Preston*, 7 Ves. jun. 547.

(*p*) See the introductory Chapter ; and see *Lowndes v. Lane*, 2 Cox, 363.

(192) The maxim *caveat emptor* will not be applied against a purchaser, where there has been fraud or misrepresentation on the part of the vendor. *Pringle v. Samuel*, 1 Litt. 46. See *Sherwood v. Salmon*, 5 Day, 439. Consistent with this principle, are the decisions in *Bostwick v. Lewis*, 1 Day, 33, 250., and in *Norton v. Hathaway*, 1 Day, 255. note *d*. These were actions at law. But in *Sherwood v. Salmon*, 2 Day, 128, which was also an action at law, (See S. C. *ut supra*) the principle laid down in the text, was fully recognized. The rule *caveat emptor* does not apply to sales by a master, because he is considered as the agent of the parties. *Tunno v. Fludd*, 1 M'Cord, 122.

Imposition and fraud upon the purchaser by any wilful misrepresentation or concealment, takes the case out of the general rule, and entitles him to be redressed in equity, in addition to and beyond the cov-

Thus, where a meadow was sold without any notice of a footway round it, and also one across it, which of course lessened its value, Lord Rosslyn decreed a specific performance with costs, as *he could not*, he said, *help the*

enants in the deed. The cases of *Bumpus v. Platner*, 1 J. Ch. R. 213; *Abbot v. Allen*, 2 ib. 519; *Johnson v. Geer*, ib. 546; *Chesterman v. Gardner*, 5 ib. 29; and *Gouverneur v. Elmendorf*, ib. 79; are authorities for this: and also for the point, that a grantee, to whom possession has been delivered under covenants of title and warranty, can have no relief in equity against his grantor for a return of purchase-money or security on account of a defect or failure of title: because he has secured himself by covenant; and he has an adequate remedy at law. If he has taken no covenants, and the title fails, he will be without remedy in equity, as well as at law, if the contract were fair and there be no fraud in the case.

The late case of *Deniston et al, assignees v. Morris et al, assignees*, 2 Edw. Ch. R. 27. was thus: the defendants sold an estate to one Sandford with promises of title and a warranty. The latter entered into possession and made improvements in buildings, &c.: and then defendants would only give him a deed with covenants as to their own acts. They represented the title as good; and engaged that they would not transfer the mortgage he was to give for the purchase-money; so that if the title failed the same should be restored. Sandford sold his interest to Dickey; and one Jackson sued Dickey and recovered having a paramount title. Dickey also was obliged to pay the mortgage; the defendants having contrary to their promise transferred it. Dickey failed; and the complainants as his assignees sued this bill alleging that the defendants had funds sufficient in their hands. The Vice Chancellor observed that, "the difficulty in the case is this; that Sandford is not the party complaining of the fraud; nor, indeed has he been injured by it. He sold the property without fraud and without covenants for an adequate consideration. According to the statement of the transaction the vendors became trustees of that part of the purchase-money, which was secured by mortgage. An implied trust, at least, was created of the purchase-money; and such an one as this court is bound to protect and preserve.—If then there be a trust fund and trustees of it; for whose benefit does it enure? The title was to be made satisfactory to Sandford and his assigns. A loss resulted in the failure of the title; and this loss has been borne by Dickey; and he or those standing in his place, are the persons entitled to the benefit of it. Consequently, the demurrers which had been filed were overruled.

purchaser who did not choose to inquire(*q*). *It was not a latent defect.* Lord Manners has said, that he believed the bar was not very well satisfied with the decision, although, as he observed, the purchaser was undoubtedly extremely negligent not to look at the estate before he purchased it(*r*).

So a description, that the land was uncommonly rich water meadow, was held to be immaterial, although the property was imperfectly watered. The Court thought (*)that it would be straining the meaning of the words "uncommonly rich water meadow land," if it were not confined to the quality of the land; and in that sense it professed to be nothing more than the loose opinion of the auctioneer or vendor as to the obvious quality of the land, upon which the vendee ought not to have placed, and could not be considered to have placed, any reliance(*s*).

And here a case(*t*) may be introduced, where the subject of the contract was a house on the north side of the river Thames, supposed to be in the county of Essex, but which turned out to be in Kent; a small part of which county happens to be on the other side of the river. The purchaser was told he would be made a churchwarden of Greenwich, when his object was to be a freeholder of Essex; yet he was compelled to take the house.

This decision, however, seems to be opposed by a case before Lord Talbot. An agreement was entered into for the purchase of a house for a coffee-house. It was found that a chimney could not be made convenient for a coffee-house; but nevertheless, the vendor filed a bill against the purchaser, to compel him to perform the agreement. Lord Talbot dismissed the bill, merely because the tenant

(*q*) *Oldfield v. Round*, 5 Ves. jun. 508.

(*r*) 1 Ball & Beatty, 250; and see *Legge v. Croker*, *ib.* 506.

(*s*) *Scott v. Hanson*, 1 Sim. 13.

(*t*) *Shirley v. Davies*, in the Exchequer, 6 Ves. jun. 678, cited.

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would be obliged to take it for a purpose he did not want(*u*).

But it may be remarked, that it is no bar to a specific performance, that the conveyance will not have the operation which the vendor thought it would. Thus where a tenant for life of a copyhold purchased the reversion in the hope of extinguishing contingent remainders, and afterwards finding that the conveyance would not affect the remainders, brought a bill to be relieved against the (*)security which he had given for the purchase-money; the Court gave him his option either to pay the principal, interest and costs, or to have his bill dismissed with costs(*x*).

So in a case where, under the *legal construction* of the terms of an agreement for a lease, the option to determine the lease was in the lessee only, and it was argued against a specific performance, that this was contrary to the intention, the Master of the Rolls said that a specific performance of a written agreement cannot be denied because the meaning of the parties does not appear(*y*).

But where a vendor gives a false description of the estate, the purchaser may at law rescind the contract(193). As where before the Reform Act an estate was stated to be but one mile from a borough town, and it turned out to be between three and four, the contract was held to be voidable by the purchaser(*z*). And the same rule must

(*u*) 1 Russ. & Myl. 128; 1 Ves. 307; and see 18 Ves. jun. 78.

(*x*) *Mildmay v. Hungerford*, 2 Vern. 243.

(*y*) *Price v. Dyer*, MS., Rolls; S. C. 17 Ves. jun. 356.

(*z*) *Duke of Norfolk v. Worthy*, 1 Camp. Ca. 337; *vide supra*, p. 42; and see *Fenton v. Browne*, 14 Ves. jun. 144; — *v. Christie*, 1 Salk. 28, by Evans; *Trower v. Newcombe*, 3 Mer. 704.

(193) See *Sherwood v. Salmon*, 5 Day, 439. S. C. at law. 2 Day, 128. See also, *Bostwick v. Lewis*, 1 Day, 33, 250. *Norton v. Hathaway*, 1 Day, 255. note *d*.

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prevail in equity where the misdescription, as in this case, is not from the nature of it a subject of compensation.

So in a case where the estate was described to have lately undergone a thorough repair, whereas it was in a complete state of ruin, and ordered to be pulled down by the district surveyor, the purchaser was allowed to rescind the contract(*a*). And where the state of the repairs was falsely represented by the seller, knowing that the house had the dry-rot, without communicating that fact to the purchaser, upon a bill filed by the seller, a specific performance was decreed, with a compensation to the purchaser(*b*).

(*) So where the purchaser of a leasehold house was aware of the ruinous state of the premises, but no mention was made at the sale by auction of a notice to repair given to the vendor by the lessor, on the day before the sale, under which the lessor re-entered and evicted the purchaser, he (the purchaser) was permitted to recover the deposit from the auctioneer, on the ground that in such transactions good faith was most essential, and the vendor or his agent was bound to communicate to the vendee, the fact of such notice(*c*).

Again, where a person for whose life the property was held, was described to be a very healthy gentleman, and in another passage a healthy gentleman, and the sellers had shortly before the sale insured the life at a sum exceeding the highest rate charged for a healthy life of the same age, the bill of the sellers for a specific performance was dismissed with costs(*d*).

But if the purchaser knew that the description was

(*a*) *Loyes v. Rutherford*, K. B. 16 May 1809.

(*b*) *Grant v. Munt*, Coop. 173.

(*c*) *Stevens v. Adamson*, 2 Stark. 422.

(*d*) *Brealey v. Collins*, 1 You. 317.

false, he cannot, it seems, take advantage of it either at law or in equity(194).

Thus, in a case before Sir William Grant(*e*), where an estate was described as being within a ring fence, it appeared, that the estate was intersected by other lands, and did not answer the description, but that the purchaser knew the situation of the estate; his Honor (after expressing a doubt whether such an objection was a subject of compensation, as it was not certain that a precise pecuniary value could be set upon the difference between a farm compact in a ring fence, and one scattered and dispersed with other land), said, that the purchaser was clearly excluded from insisting upon that as an objection to complete the contract. He saw the farm before he (*)purchased; he had lived in the neighborhood all his life. This variance was the object of sense; he must have known whether the farm did lie in a ring fence or not; and upon the same ground, that the purchaser could not get rid of the contract on account of the difference in the description of the farm, his Honor determined he could not be entitled to compensation. If a compensation was given to him, he would get a double allowance; for if he had knowledge that what he proposed to purchase did not answer the description, it must be taken that he bid so much the less.

This case, we observe, went a step farther than either the case before the Court of Exchequer, or that before Lord Rosslyn, in neither of which was there any warranty

(*e*) *Dyer v. Hargrave*, 10 Ves. jun. 505.

(144) A purchaser of land, being informed of defects in the vendor's title, and agreeing, nevertheless, to pay interest on the purchase money, from a certain day, shall not be relieved from the payment of it, on the ground that he could not get possession of part of the land, which he knew, at the time of entering into the agreement, was held by another person. *Mayo v. Percell*, 3 Munf. 243.

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or false description. But in this case it was expressly stated, that the whole estate was within a ring fence; but the Master of the Rolls thought that circumstance immaterial, as the purchaser knew the description was false; and his Honor appears to have grounded his decision on the doctrine, that even at law a warranty is not binding where the defect is obvious, and put the cases of a horse with a visible defect, and a house without a roof or windows warranted as in perfect repair.

But where a particular description is given of the estate, which turns out to be false, and the purchaser cannot be proved to have had a distinct knowledge of the actual state of the subject of the contract, he will be entitled to a compensation, although he may be compelled to perform the contract.

Thus, in the case before the Master of the Rolls, the particular described the house as being in good repair, and the farm as consisting of arable and marsh land, in a high state of cultivation. It appeared, however, that the house was not in good repair, and that the land was not in a high state of cultivation. The judgment contains (*)the facts of the case, and is highly satisfactory. His Honor said, "These objections are such as a man may have an indistinct knowledge of, and he may have some apprehension that, in those respects, the premises do not completely correspond with the description, and yet the description may not be so completely destroyed as to produce any great difference in his offer. As to the marsh land, it is very uncertain, whether, by any view, it was possible for him to judge of that. It is stated by many witnesses, that the season of the year was just at the breaking of a frost, and represented that no man could, at that time, say whether the land was well or ill cultivated. So he may have seen some trifling defects in the house, and might not intend to make the objection, if they turned out to be nothing more than they appeared upon the sur-

face. He might consider them too trivial, and not mean to claim compensation for an objection so insignificant. But afterwards, when he came to examine, according to this evidence, he discovered that the house was materially defective, and very much out of repair. Admitting that he might, by minute examination, make that discovery, he was not driven to that examination; the other party having taken upon him to make a representation: otherwise he would be exonerated from the consequence of that in every case where, by minute examination, the discovery could be made. The purchaser is induced to make a less accurate examination by the representation, which he had a right to believe. This purchaser, therefore, is entitled to compensation for the defects of the house, and the cultivation of the marsh land."

But notwithstanding that the foregoing case has established, that the repairs necessary to a house are a subject of compensation, although the house is described to be in good repair, yet his Honor seemed to admit, that if the purchaser wanted possession of the house to live in at (*)a given period, by which time the repairs could not be completed, he ought not to be bound to complete the contract(f).

Where the defect is a *latent* one, and the purchaser cannot by the greatest attention discover it, if the vendor be aware of it, and do not acquaint the purchaser with the fact, he may set aside the contract at law, although he bought the estate *with all faults*(g); and equity will not enforce a specific performance(h).

• This was decided at law, by Lord Kenyon at *nisi prius*, upon the sale of a ship. It was insisted, for the seller, that the rule *caveat emptor* applied; but Lord Kenyon

(f) *Vide infra*, ch. 8.

(g) *Mellish v. Motteux*, Peake's Ca. 115.

(h) *Oldfield v. Round*, 5 Ves. jun. 508.

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said, that there are certain moral duties, which philosophers have called duties of imperfect obligation, such as benevolence to the poor, and many others, which courts of law do not enforce. But in contracts of all kinds, it is of the highest importance that courts of law should compel the observance of honesty and good faith. This was a latent defect, which the plaintiffs could not, by any attention whatever, possibly discover; and which the defendants knowing of, ought to have disclosed to the plaintiffs. The terms to which the plaintiffs acceded, of taking the ship with all faults, and without warranty, must be understood to relate only to those faults which the plaintiffs could have discovered, or which the defendants were unacquainted with.

In a late case⁽ⁱ⁾, the same point arose before Lord Ellenborough at *nisi prius*; but ultimately it was not necessary to decide it. Lord Kenyon's decision was cited. Lord Ellenborough said, that he could not subscribe to (*)the doctrine of that case, although he felt the greatest respect for the authority of the Judge by whom it was decided. Where an article is sold *with all faults*, he (Lord Ellenborough) thought it was quite immaterial how many belonged to it within the knowledge of the seller, *unless he used some artifice to disguise them, and to prevent their being discovered by the purchaser*. The very object of introducing such a stipulation is, to put the purchaser on his guard, and to throw upon him the burthen of examining all faults, both secret and apparent. A man may be possessed of a horse he knows to have many faults, and wish to get rid of him, for whatever sum he would fetch. He desires his servant to dispose of him; and, instead of giving a warranty of soundness, to sell him

(i) *Baglehole v. Walters*, 3 Camp. Ca. 154. See 1 Ball & Beatty, 515. *Early v. Garrett*, 9 Barn. & Cress. 928; 4 Man. & Ryl. 687, S. C.

with all faults. Having thus laboriously freed himself from responsibility, is he to be liable, if it be afterwards discovered that the horse was unsound? Why did not the purchaser examine him in the market when exposed to sale? By acceding to buy the horse with all faults, he takes upon himself the risk of latent or secret faults, and calculates accordingly the price which he gives. It would be most inconvenient and unjust if men could not, by using the strongest terms which language affords, obviate disputes concerning the quality of the goods which they sell. In a contract such as this, his Lordship thought there was no fraud, unless the seller, by positive means, renders it impossible for the purchaser to detect latent faults; and he made no doubt, that this would be held as law when the question should come to be deliberately discussed in any court of justice. •

In a still later case, upon the sale of a ship, the particular stated, amongst other things, that the hull was nearly as good as when launched. And after stating when she was to be seen, added, “with all faults as they now lie.” Then followed an inventory of the stores, to which the (*)following declaration was added, “the vessel and her stores to be taken with all faults as they now lie, without any allowance for weight, length, quality, or *any defect whatsoever.*” The ship was quite unseaworthy. She belonged to underwriters to whom she had been abandoned. The agents for the sale must have known her defects, and she was kept constantly afloat, so that her defects could not be discovered. The person who framed the particular had not examined the vessel(k)(195). Mansfield, C. J. said that these words were very large, to exclude the buyer from calling upon the seller for any defect in the thing sold, but if the seller was guilty of any positive

(k) *Schneider v. Heath*, 3 Camp. Ca. 506.

(195) See *Dyer v. Lewis*, 7 Mass. Rep. 284.

(*315)

fraud in the sale, these words will not protect him. There might be such fraud either in a false representation, or in using means to conceal such defect. He thought the particular was evidence here by way of representation, that states the hull to be nearly as good as when launched, and that the vessel required a most trifling outfit. Now, was this true or false? If false, it was a fraud, which vitiates the contract. What was the fact? The hull was worm-eaten, the keel was broken, and the ship could not be rendered seaworthy without a most expensive outfit. The agent says, that he framed this particular without knowing any thing of the matter. But it signifies nothing whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if, in point of fact, it turns out to be false. But, besides this, it appears here that means were taken fraudulently to conceal the defects in the ship's bottom. These must have been known to the captain, who was to be considered the agent of the owners, and he evidently, (*)to prevent their being discovered by persons disposed to bid for her, removed her from the ways where she lay dry, and kept her afloat in the dock till the sale was over. Therefore, consistently with the decided cases upon this subject, the learned Judge was of opinion, that the purchaser was entitled to recover back his deposit.

In a case which occurred a few months before, upon the sale of a ship, where the Court held that, in point of fact, there was no fraud, Mr. Justice Heath said, that the meaning of selling "with all faults" is, that the purchaser shall make use of his eyes and understanding to discover what faults there are. He admitted that the vendor was not to make use of any fraud or practice to conceal faults. The learned Judge adhered to the doctrine of Lord Ellenborough, above stated, without any difficulty. Mr. Justice Chambre held, there must be evidence of

fraud to enable the Court to depart from the written agreement. Mr. Justice Gibbs agreed with Lord Ellenborough's doctrine. Even if there had been a representation it would not have availed. He held, that if a man brought him a horse, and made any representation whatever of his quality and soundness, and afterwards they agreed in writing for the purchase of the horse, that shortened and corrected the representations, and whatsoever terms were not contained in the contract would not bind the seller. But the learned Judge agreed that *fraud* would not be done away by the contract, and he mentioned the case of a sale of a house, where the seller being conscious of a defect in a main wall, plastered it up and papered it over, and it was held that as the seller had expressly concealed it, the purchaser might recover^(l). (*) As the law now stands, unless there be actual fraud, the written contract cannot be avoided^(I).

But the ground and basis of an action in a case of this nature, for recovery of a deposit, where the contract is *in fieri*; or of damages, where the contract is actually executed, is the *scienter*; and, therefore, if the vendor was not aware of the defect, he will not be answerable for it. Nor will trifling defects be a sufficient foundation for such an action.

Thus, in a case^(m) where a purchaser brought an action against a vendor, to recover damages for having sold him a house, knowing it had the dry-rot; it appeared, that the house was situated in a clayey soil, and that the floor lay near the ground, by which some of the timbers had rotted; but the vendor was not aware of the defects, and the purchaser was nonsuited. Lord Kenyon said,

(l) *Pickering v. Dowson*, 4 Taunt. 779. See *Jones v. Bowden*, *ib.* 847; *Shepherd v. Kain*, 3 Barn. & Ald. 240.

(m) *Bowles v. Atkinson*, N. P. MS.

(I) As to concealment of defects of title, see *post*.

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the circumstances that had been proved in this case might be described by a word that was used by one of the witnesses; they were mere *bagatelles*. If these small circumstances were to be the foundation of an action, every house that was sold would produce an action. If a broken pane of glass that might be found in a garret window, perhaps, had not been described by the seller, it would be ground of an action. If he was to consider himself as a witness in the cause, he could say he had met with something of this kind, and he never thought himself imposed upon, because now and then some rotten boards and rotten joists might be found about a house. Besides, there was no imposition, no *mala fides* in this case.

Although the purchaser might, with proper precaution, (*)have discovered the defect; yet if, during the treaty, the vendor *industriously* conceal the fact, equity will not assist him.

Thus, upon a suit for a specific performance, the defence was, that the estate was represented to the defendant as clearing a net value of 90*l.* per annum, and no notice was taken to him of the necessary repair of a wall to protect the estate from the river Thames, which would be an out-going of 50*l.* per annum. And it appearing, upon evidence, that there had been an *industrious concealment* of the circumstances of the wall during the treaty, the Lord Chancellor dismissed the bill, but without costs(n).

And here a case may be mentioned, where an estate appeared to be subject to a right of entry to dig for mines; the *purchaser* did not object to the title on this ground, but insisted upon a specific performance with a compensation, which was accordingly decreed(o).

(n) Shirley v. Stratton, 1 Bro. C. C. 140.

(o) Seaman v. Vawdrey, 16 Ves. jun. 390.

SECTION III.

Of Defects in the Quantity of the Estate.

IF a purchaser of an estate thinks he has purchased *bona fide* a part which the vendor thinks he has not sold, that is a ground to set aside the contract, that neither party may be damaged; because it is impossible to say, one shall be forced to give that price for part only which he intended to give for the whole; or that the other shall be obliged to sell the whole for what he intended to be the price of part only(*p*). Upon the other hand, if both (*)understood the whole was to be conveyed, it must be conveyed. But again, if neither understood so, if the buyer did not imagine he was buying any more than the seller imagined he was selling the part in question, then a pretence to have the whole conveyed is as contrary to good faith on his side, as a refusal to sell would be in the other case(*q*)(197).

If an estate be sold at so much per acre, and there is a deficiency in the number conveyed, the purchaser will be entitled to a compensation, although the estate was estimated at that number in an old survey(*r*)(198). •

(*p*) See 13 Ves. jun. 427; and see *Higginson v. Clowes*, 15 Ves. jun. 516, stated, as to this point, *supra*, p. 38.

(*q*) *Per* Lord Thurlow. See 1 Ves. jun. 211; and see 6 Ves. jun. 339.

(*r*) *Sir Cloudesley Shovel v. Bogan*, 2 Eq. Ca. Abr. 688, pl. 1.

(197) See *Nelson v. Matthews*, 2 Hen. & Munf. 164.

(198) See *Quesnel v. Woodlief*, 2 Hen. & Munf. 173. in note. *Jolliffe v. Hite*, 1 Call, 301. *Nelson v. Carrington*, 4 Munf. 332. *Carter v. Campbell*, Gilmer, 159.

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The rule is the same, though the land is neither bought nor sold professedly by the acre ; the presumption is, that in fixing the price, regard was had on both sides to the quantity which both suppose the estate to consist of. The demand of the vendor, and the offer of the purchaser, are supposed to be influenced in an equal degree by the quantity, which both believe to be the subject of their bargain. The general rule therefore is, that where a misrepresentation is made as to the quantity, though innocently, the right of the purchaser is to have what the vendor can give, with an abatement out of the purchase-money, for so much as the quantity falls short of the representation(s)(199).

But where the lands *in a conveyance* are mentioned to contain so many acres *by estimation*, or the words "more or less" are added, if there be a small portion more than the quantity, the vendor cannot recover it; and if there be a small quantity less, the purchaser cannot obtain any compensation in respect of the deficiency(t). Indeed, (*)a case is said to have been decided, where a man conveyed his land by the quantity of one hundred acres, were it more or less, and it was not above sixty acres; but the purchaser had no relief, because it was his own laches(u)(200).

(s) *Hill v. Buckley*, 17 Ves. 394, *per* Sir William Grant.

(t) *Twynford v. Warcup*, Finch, 310. See *Marquis of Townshend v. Stanbroom*, 6 Ves. jun. 328; *Rushworth's case*, Clay. 46; *Neale v. Parkin*, 1 Esp. Ca. 229.

(u) *Anon.* 2 Freem. 106.

(199) See *Waters v. Travis*, 9 Johns. Rep. 465. on appeal. And where there is a great deficiency in the quantity of land, the purchaser is entitled to have the contract rescinded *in toto*. *Glover v. Smith*, 1 Des. 433. See also, *Peay v. Briggs*, 2 Rep. Con. Ct. 100.

(200) In *Quesnel v. Woodlief*, 2 Hen. & Munf. 173, 174; in note, the court say, that the words "more or less," inserted in a deed, "should be restricted to a reasonable or usual allowance for small errors in sur-

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That however was the case of an actual conveyance. Where the contract rests *in fieri*, the general opinion has

veys, and for variations in instruments." See *Smith v. Evans*, 6 Binn. 102. *Grantland v. Wight*, 2 Munf. 179. *Jollife v. Hite*, 1 Call, 301. *Mann & Toles v. Pearson*, 2 Johns. Rep. 37. *Snow v. Chapman*, 1 Root, 528. *Howes v. Barker*, 3 Johns. Rep. 506. *Powell v. Clark*, 5 Mass. Rep. 355. *Howe v. Bass*, 2 Mass. Rep. 380. *Jackson v. Barringer*, 15 Johns. Rep. 471. *Jackson v. Defendorf*, 1 Caines' Rep. 493. *Thomas v. Perry*, 1 Peters' Rep. 49, 58. *Dayne v. King*, 1 Yeates, 322. *Boar v. M'Cormick*, 1 Serg. & Rawle, 166. *Fleet v. Hawkins*, 6 Munf. 188. *Pringle v. Witten's Exrs.* 1 Bay, 259. *Gray v. Handkinson*, 1 Bay, 278. *Wainwright v. Read*, 1 Des. 573. *Jones' Dev. v. Carter*, 4 Hen. & Munf. 184. *Hull v. Cunningham's Exr.* 1 Munf. 330, 335, 336.

"In a conveyance of land by deed, in which the land is certainly bounded, it is very immaterial, whether any or what quantity is expressed : for the description by the boundaries is conclusive. And when the quantity is mentioned in addition to a description of the boundaries, without any express covenant that the land contains that quantity, the whole must be considered as mere description. (Per Parsons, C. J. 5 Mass. 155 ; S. P. in *Large v. Penn*, 6 S. & R. 488.) In the latter case cited in which the plaintiff sued the defendant for breach of covenant, it appeared that the deed described the land as "containing two acres and three quarters of an acre, being the lot mentioned in a plan or map of land (number 18, R. M. Penn,) and which, upon a partition and division of the said W. M., was, *inter alia*, allotted and assigned unto the said R. and M. Penn, her heirs and assigns forever." And then followed a special covenant of warranty in the usual form. The question being whether there was a covenant that the quantity of land should amount to two acres and three quarters ? The court held, that there was not. It is the boundaries to which the grantee must look ; he has a right to all the land within them : and the quantity is introduced, not by way of covenant, but of description.

So, in *Davis et al. v. Rainsford*, 17 Mass. R. 207, Wilde, J. in delivering the opinion of the court said—"no rule of law can be more firmly established, than that whenever, in the description of land conveyed by deed, known monuments are referred to as boundaries, they must govern ; although neither courses, nor distances, nor the computed contents, correspond with such boundaries. But this fundamental rule in the construction of deeds is not inflexible, but like other rules of law, it must sometimes yield to exceptions. The reason why monuments are to govern the courses and distances in a deed, is that the

been that the purchaser, if the quantity be considerably less than it was stated, will be entitled to an abatement,

former are less liable to mistakes. When the reason of the rule ceases, the rule is not to be applied. When lines are laid down on a map or plan, and are referred to in a deed, the courses, distances, and other particulars appearing on such plan, are to be as much regarded as the true description of the land, as they would be, if expressly recited in the deed. This is a familiar rule of construction in all those cases, wherein no other description is given in the title deeds, than the number of the lot on a surveyor's plan of a township or other large tract of land.

The land in question was conveyed to the plaintiffs at the time they were about erecting a store; and it was stipulated in the deed, that the southwardly wall of the store should be placed exactly on the line last mentioned in the description of the land conveyed. The store was accordingly erected, and the southwardly wall was placed as it now stands, in conformity to the admeasurement, and to the plan, no objection being then made to its position by the grantor. This wall, when built, was a monument; and it was referred to in the deed, although it was not at that time erected. This part of the case is similar to the case of *Makepeace v. Bancroft*, 12 Mass. 469, excepting the wall in that case did not exactly coincide with the line, as described in the deed; and in the case before us it does. The case last cited was thus—"a certain piece of land in C. measuring on W. street 22½ feet, and keeping the same width 70 feet back to another way, with all the privileges and appurtenances to the said lot belonging, meaning to convey thereby the same lot which was conveyed to the said grantor by M'Neil, by his deed dated, &c., including one half of the brick wall mentioned in the deed last aforesaid." The plaintiff sued for breach of covenant in respect to one half the brick wall, with the land under the same; there being no question as to the residue. It appeared at the trial, which was had before Jackson, J., that one Porter was seized of this lot, and also of another lot adjoining. He conveyed *this* to R., and the other to one W., who conveyed to S. Then R. and S. agreed to exchange lots and by direction of the latter the former conveyed to Neil. At the time of the conveyance by P., he owned a third lot on which was a brick house; and the deed to W. included one half of the wall of that house. R. intending to build on the lot he received from S. in exchange says in the deed to Neil "I do also convey to said Neil the one half of a brick wall that I hereby engage to erect on the adjoining lot now owned by S., which the said S. is this day to convey to me." S. conveyed to R. one half the wall of the house aforesaid; and R. undertaking to convey to the said appointee of S. one half of the wall which he was to build.

although the agreement contain the words *more or less*, or *by estimation*(*x*).

(*x*) *Hill v. Buckley*, 17 Ves. 394.

But the wall of the house afterwards built by R. was built wholly on R.'s lot contrary to his intention, which was to place one half of the wall adjoining to Neil on his lot. The latter conveyed to defendant referring to R.'s deed and "including the one half of the brick wall mentioned in said deed." The defendant having conveyed his title to the plaintiff; and the Court held that Neil was seized of the lot, so as to include one half of the wall, which R. built for his use, and did of course convey the same to the defendant, who became seized until he parted with his title to the plaintiff. Whether this seizin was an indefeasible one or not, was immaterial in that action. The monument set up after the delivery of the deed, will conclude the grantor, even though it should not agree with the lines specified in the deed.

And if a survey is referred to in a deed, that is to be regarded, though the boundaries mentioned in the deed might exclude the land included in the survey. *Lunt v. Holland*, 14 ib. 149.

If land is bounded on a road, the land over which the road runs is excluded. *Alden v. Murdock*, 13 ib. So, to the *bank* of a stream, it excludes the stream. *Hatch v. Dwight & al.* 17 ib. 298. But if the boundary is by a river, it extends to the thread of the river, unless previous grants negative this construction. 14 ib. 149.

In *Crosby v. Parker*, (4 Mass. 110.) where the point in dispute was stated by Chief Justice Parsons in delivering the opinion of the Court thus. "E. & A. Jefts were once seized in fee of the several parcels of land mentioned in the case, one of which was claimed by Wilson, another by the demandant, and a third by J. Jefts, by separate deeds from E. & A., and under J. Jefts the tenant claims: And to find the issue in the cause it was necessary to ascertain the north-east corner of the parcel of land conveyed to the demandant by the deed of the said E. & A. dated 1805. This deed places the north-east corner at a stake and stones by Wilson's land on a certain highway. The next inquiry then is, where was Wilson's land? He had before purchased his parcel of the same grantors by a deed duly executed, and the stake and stones standing by this land of Wilson's is agreed. The tenant insists that this stake and stones is the north-east corner of the demandant's land; and if it is, the verdict is right. The same Wilson had contracted with J. Jefts, the brother and agent of the grantors, and had paid him for half an acre of land to the southward of his first purchase, and adjoining on the same highway, at the south-easterly corner of which was a stake and

But in a case where the estate was stated to contain *by estimation* forty-one acres, *be the same more or less*;

stones by the same highway, which would be the north-east corner of Crosby's land, if it bounded northwardly on the half acre, which he contends that it did: And if this last stake and stones is the north-east corner of Crosby's land, the verdict is wrong. The question therefore is reduced to this, whether Crosby's land adjoining northwardly on Wilson's first purchase, of which he had a conveyance, or on the half acre, of which he had no conveyance.

Wilson, after his bargain with J. Jefts, occupied the half acre for two years, as he would occupy his own land, including the time when Crosby's deed was executed, but he did not claim the land and would have informed any inquirer that he had no title to it, but had contracted with J. Jefts for one. In 1806, he applied to the owners, E. & A. Jefts for a title, but they refusing to give him one, he abandoned the occupation. It further appears that Crosby's deed conveys to him his land, *with all the buildings thereon*, and if he is bounded on Wilson's first purchase, there will be only a barn on his land; but if he is bounded on the half acre, there will be a house also included.

For the tenant it appears, that neither the grantor nor Parker had any knowledge that J. Jefts had bargained with Wilson for the half acre: and as to the expression of "*all the buildings*," it was found that the grantors purchased all these parcels of S. P. by a deed conveying them with all the buildings thereon, when in fact there were no buildings thereon, they having been erected afterwards: and that all the land, to which Wilson had any title on record, was his first purchase. The verdict is right, because Crosby's is northwardly on Wilson's land, and Wilson's first purchase is all the land that he in fact owned; and all the land, of which he had any title on record, by which the tenant could ascertain the boundaries, and all the land, which the grantors of Crosby, who were also the grantors of Wilson, could contemplate as Wilson's land. And if the first purchase of Wilson is not a boundary of Crosby's land, then there will be an half acre between Crosby and Wilson, the property of the grantors, not conveyed, and Crosby's northern boundary will be on other land of the grantors. Judgment on the verdict.

In *Worthington et al. v. Hyllier*, 4 Mass. R. 197, where the estate intended to be conveyed included several particulars, which were necessary to ascertain the identity of the estate; *held*, that nothing could pass by the conveyance, except what agreed to every particular in the description; but every deed ought to be construed, if it can, that the intent of the parties may prevail, and not be defeated. If the description in a conveyance be so uncertain, that it cannot be known what

and upon an admeasurement, the quantity proved to be only between thirty-five and thirty-six acres; and the purchaser claimed an abatement; the Master of the Rolls decided against the claim. His Honor said, that the effect of the words "more or less" added to the statement of quantity had never been yet absolutely fixed by decision; being considered sometimes as intending to cover only a small difference the one way or the other;

estate was intended, the conveyance is void. In a deed-poll where there is a doubt, the construction must be against the grantor. But a description of land by a false reference must be rejected, if the land is sufficiently ascertained without.

Parsons, C. J. said.—It seems to be a general rule, that when the description of the estate intended to be conveyed includes several particulars, all of which are necessary to ascertain the estate to be conveyed, no estate will pass, except such as will agree to every particular of the description. Thus if a man grant all the land in his own occupation in the town of W., no estate can pass, except what is in his own occupation, and is also situate in that town.

But if the description be sufficient to ascertain the estate intended to be conveyed, although the estate will not agree to some of the particulars in the description, yet it shall pass by the conveyance, that the intent of the parties may be effected. Thus if a man convey his house in D., which was formerly R. C.'s, when it was not R. C.'s; but T. C.'s, the house in D. shall pass, if the grantor had but one house in D., because by the description of his house in D. the estate intended to be conveyed is sufficiently ascertained.

In the case before the court, the mortgagor has described, as the estate to be conveyed, *all that his farm of land in W., on which he then lived, containing 100 acres, with his dwelling house and barn thereon standing.* This is sufficient to ascertain the estate to be conveyed; and if no other particulars were inserted, there could be no doubt. But he adds that the farm, on which he lived, was *the lot No. 17, in the first division of land there* and included within certain limits mentioned. The limits of this lot are truly described, but in fact the farm, on which he lived, was not No. 17, but a different parcel of land. By the rule then this particular of the description is to be rejected, because without it the description is sufficiently certain; and because if it be essential, the deed will be void. Indeed rather than the deed should be void, a construction ought to be adopted, on which both the farm and the lot should be conveyed.

sometimes as leaving the quantity altogether uncertain, and throwing upon the purchaser the necessity of satisfying himself with regard to it. In this instance, the description was rendered still more loose by the addition of the words "by estimation." She estimated extent of ground frequently proves quite different from its contents by actual admeasurement. It cannot be contended that the terms "estimated" and "measured" have the same meaning. If a man was told that a piece of land was never measured, but was estimated to contain forty-one acres, would that representation be falsified by showing (*)that, when measured, it did not contain the specified number of acres? The only contradiction to that proposition would be, that it had not been estimated to contain so much(y)(201).

(y) *Winch v. Winchester*, 1 Ves. & Beam. 375.

(201) See *Nelson v. Matthews*, 2 Hen. & Munf. 164. It was decided in *Carter v. Campbell*, in the Court of Appeals in Virginia, (Gilm. R. 159.) that where a sale is by the acre, the right of ascertaining the quantity by a survey, exists, whether expressly reserved or not; and if no time be limited for making the election to survey, it may be done at any time before the whole business is closed. But where the articles of agreement have been carried into effect, by a conveyance from the vendor, and bond for the purchase money from the vendee, without a survey, there, *in general*, the contract is considered as closed. But there are cases, which are exceptions. For instance, where the *real* differs so much from the *estimated* quantity of land, as to make it evident, either that both parties were under a misapprehension, or one of them guilty of a gross fraud. (Per Tilghman, C. J. in *Bailey v. Snyder*, 13 S. & R. 161.) In *Smith v. Evans*, 6 Binn. 102, where the sale was decided to be for a sum in gross, although the price of twelve shillings per acre was mentioned, the articles had been carried into execution, by a conveyance from the vendor, and bond and mortgage from the vendee; "a circumstance of great weight with me, said the Chief Justice, in forming an opinion in that case." In the case last cited from S. & R., that circumstance did not exist; so that the contract was to be judged of only by the articles of agreement. Accordingly, it was there held to be a sale by the acre. It is proper to observe,

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The case of *Day v. Finn*(z), however, seems a considerable authority, that at least the words *more or less* ought only to clear a small deficiency where the contract rests *in fieri*. There, in ejectment, the plaintiff declared on a lease for years of a house, and thirty acres of land in *D.*; and that *J. S.* did let to him the said messuage and thirty acres, by the name of his house in *B.*, and ten acres of land there, *sive plus sive minus*: it was moved in arrest of judgment; because that thirty acres cannot pass by the name of ten acres, *sive plus sive minus*; and so the plaintiff had not conveyed to him thirty acres, for when ten acres are leased to him *sive plus sive minus*, these words ought to have a reasonable construction to pass a reasonable quantity, either more or less, and not twenty or thirty acres more. Yelverton agreed, for the word ten acres, *sive plus sive minus*, ought to be intended of a reasonable quantity, more or less, by a quarter of an acre, or two or three at most; but if it be three acres less than ten, the lessee must be contented with it. *Quod Fenner and Crook concesserunt*, and judgment was stayed.

And upon a motion in *Portman v. Mill*(a) it appeared

(z) Owen, 133; and see the cases cited above.

(a) 2 Russ. 570. -

however, that the land was not certainly described; and the land was sold at a price named per acre.

A conveyance of a certain number of acres *more or less* imply, that the boundaries are fixed, and may contain more or less. They show an understanding of the parties that the boundaries should not be affected by a surplus or deficiency. Thus, in *Glen et al. v. Glen*, 4 S. & R. 488, the deed stated that the grantor conveyed 200 acres *more or less*. The parties afterwards had it surveyed; the survey agreed, except an allowance of six per cent. for roads, &c. It turned out however, after the decease of the parties, that the tract was in fact surplus, about 13 acres; and held, clearly, that the heirs could not recover a consideration for the excess: it not being so great as to show an essential mistake.

that the lands were described as containing, by estimation 349 acres, or thereabouts, be the same more or less, and the agreement stipulated that the parties should not be answerable for any excess or deficiency in the quantity of the premises, but that the premises should be taken by the purchaser at the quantity, whether more or less ; and (*)the actual number of statute acres was less by 100 acres than the number stated in the contract. Lord Eldon said, that as to this stipulation, he never could agree that such a clause (if there were nothing else in the case) would cover so large a deficiency in the number of acres as was alleged to exist there.

But however the rule may be finally settled, yet a seller knowing the true quantity, would not be allowed to practice a fraud, by stating a false quantity, with the addition of the words " more or less," or the like(b)(202).

If an estate be represented as containing a given quantity, although not professedly sold by the acre, the circumstance that the purchaser was intimately acquainted with the estate, would not necessarily imply knowledge of its exact contents ; while a particular statement of the quantity would naturally convey the notion of actual ad-measurement : and therefore the Court would not be warranted in inferring that the purchaser knew the real quantity(c). For, if the purchaser did know the real quantity, of course he could not claim any allowance for the deficiency.

In a late case(d), the agreement was to sell an estate " containing the several quantities after mentioned, that is to say, by the plan drawn by Mr. F. in 1792 ;" the agreement then proceeded to state the numbers and par-

(b) See *Duke of Norfolk v. Worthy*, 1 Camp. Ca. 337 ; *supra*, p. 38, and 1 Ves. & Beam. 377.

(c) *Winch v. Winchester*, 1 Ves. & Beam. 375.

(d) *Gell v. Watson*, 16 Nov. 1825, MS.

(202) See *Nelson v. Matthews*, 2 Hen. & Munf. 164.

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ticular quantities of *each close*, and then proceeded to add, "containing altogether *about* 101^a. 3^r. 29^p." There was a deficiency of 2^a. in two closes which together were stated to contain 8^a. 1^r. 4^p. It was held that the purchaser was entitled to an abatement, as the quantity of each close was particularly specified.

(*) The principle upon which an abatement in these cases is made, is, to place the parties in the situation in which they would have stood, if there had been no misrepresentation. Therefore, where a man purchased a wood, which was, by mistake, represented to contain nearly twenty-six acres more than it did, but the purchaser was, in the course of the negotiation, furnished with the value of the woods *qua* wood, so that he obtained the right quantity of wood but not of soil, the abatement was decreed to be only so much as soil covered with wood would be worth, after deducting the value of the wood(e).

Where lands are shown to a purchaser as part of his purchase, he will be entitled to them, although expressly excepted in his conveyance by name, provided he did not know them by that name(f)(203).

So if a man purchase an estate by a particular, and in the conveyance part of the land is left out, equity will relieve him(g); but it must be clear that he did purchase by the particular, because it is not a writing within the statute of frauds; and, therefore, unless that be the case, or the agreement can be otherwise proved, the Court cannot relieve(h).

(e) *Hill v. Buckley*, 17 Ves. jun. 394.

(f) *Oxwick v. Brockett*, 1 Eq. Ca. Abr. 355, pl. 5.

(g) *Prec. Cha.* 307, *arguendo*; and see *Nelson v. Nelson*, *Nels. Cha. Rep.* 7.

(h) *Cass v. Waterhouse*, *Prec. Cha.* 29. See *Clinan v. Cooke*, 1 *Scho. & Lef.* 22; and see ch. 3, *supra*; and 2 *Dow.* 301.

(203) See opinion of PARSONS, Ch. J. in *Worthington v. Hyll-
yer*, 4 *Mass. Rep.* 205.

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On the other hand, the Court will equally relieve a vendor, where more land has passed than was contracted for; although in an early case⁽ⁱ⁾(I) this relief^(*) was denied; because the defendant was a purchaser upon valuable consideration. But it is now clear, that if land be expressly conveyed, or pass by general words, which was not mentioned in the particular by which the purchase was made, or was not intended to be conveyed; the purchaser will be decreed to re-convey it^(k).

And where a purchaser took a conveyance of an estate from his own instructions, he was held not to be entitled to lands answering the general description in the advertisements of sale, but which were not included in his conveyance, nor in a more particular description from which he prepared his instructions^(l).

To come to a right conclusion on this branch of our subject, we must be informed that an acre does not always contain the same superficial quantity of land. The word acre at first denoted, not a determined quantity of land, but any open ground or field. It afterwards signified a measured portion of land, but the quantity varied, and was not fixed until the statute^(l) *de terris mensurandis*^(m), according to which an acre contains one hundred and sixty square perches; so that every acre is a superficies

(i) Clifford v. Laughton, Toth. 83.

(k) Tyler v. Beversham, Rep. temp. Finch, 80; 2 Ch. Ca. 195. See Gibson v. Smith, Barnard. Ch. Ca. 491.

(l) Calverley v. Williams, 1 Ves. jun. 210.

(m) 33 Edw. I.; and see 24 H. VIII. c. 4; 2 Inst. 737; Co. Litt. 69 a; Spelm. Gloss. v. *Acra, particata, terræ, pertica, pes forestæ, roda terræ*. Cow. Interp. v. Acre.

(I) Probably the defendant had purchased without notice from the first purchaser.

(I) It was formerly holden not to be a statute, but only an ordinance. Stowe's case, Cro. Jac. 603; but this has since been overruled. Rex v. Everard, 1 Lord Raym. 638.

of forty perches long, and four broad ; or in that proportion, be the length or breadth more or less. The length of the perch was, previously to the statute of Edward, fixed at five yards and a half, or sixteen feet and a half, (*)by the statute called *compositio ulnarum et perticarum(n)*, and the act of Edward must of course be construed with reference to this standard. Lord Kenyon seems to have thought it impossible to contend, that a custom should prevail that a less space of ground than an acre should be called an acre(o); but in several places the perch is measured with rods of different lengths, and notwithstanding Lord Kenyon's *dictum, consuetudo loci est observanda(p)*, so that a greater or less space of ground than a statute acre may, in compliance with the custom of the place where the land lies, be called an acre. In some places the perch is measure by a rod of twenty-four feet, in some by one of twenty feet(q), and in others by one of sixteen feet(r). And we are now to inquire in what cases the custom of the country in this respect shall or shall not prevail.

In adversary writs the number of acres are accounted according to the statute measure(s), but in fines, and common recoveries, which are had by agreement and consent of parties, the acres of land are according to the customary and usual measure of the country, and not according to the statute(t).

(n) See 4 Inst. 274.

(o) Noble v. Durell, 3 T. Rep. 271 ; and see Hockin v. Cooke, 4 T. Rep. 314 ; Master of St. Cross v. Lord Howard de Walden, 6 T. Rep. 338.

(p) 6 Rep. 67. a.

(q) Crompt. on Courts, 222, who cites a case in the Exchequer, related to him by one of the Barons ; and also 47 E. III. [fo. 18 a, pl. 35 ;] and see Barksdale v. Morgan, 4 Mod. 185.

(r) Co. Litt. 3 b. See Dalt. c. 112, s. 25.

(s) Andrew's case, Cro. Eliz. 476, cited.

(t) Sir John Bruyn's case, 6 Co. 67 a, cited ; Waddy v. Newton, (*325)

So, which is more to our present purpose, where a man (*)agrees to convey(*u*), or actually conveys(*x*) any given number of acres of land, which are known by estimations or limits, there the acres shall be taken according to the estimation of the country where the land lies, be they more or less than the measure limited by the statute ; for they pass as they are there known, and not according to the measure by statute.

But if a man possessed of a close containing twenty acres of land by estimation, which is not eighteen, grant ten acres of the same land to another, there the grantee shall have ten acres according to the measure fixed by the statute, because the acres of such a close are not known by parcels, or metes and bounds, and so this case differs from the one immediately preceding it(*y*). And it is said, that if one sells land, and is obliged that it contain twenty acres, the acres shall be taken according to the law, and not according to the custom of the country(*z*).

But the law upon this subject is altered by an Act of the 5th of the late King, intituled, "An Act for ascertaining and establishing Uniformity of Weights and Measures." After providing that(*a*) the straight line or distance between the centres of the two points in the gold studs in the straight brass rod now in the custody of the clerk of the House of Commons, whereon the words and figures, "standard yard, 1760," are engraved,

8 Mod. 276. See *Floyd v. Bethill*, 1 Roll. Rep. 420, pl. 8 ; and see *Treswallen v. Penhules*, 2 Rolle's Rep. 66 ; 12 Vin. 240.

(*u*) *Some v. Taylor*, Cro. Eliz. 665.

(*x*) 47 E. III. 18 a, pl. 35 ; 6 Co. 67 a ; *Morgan v. Tedcastle*, Poph. 55 ; *Floyd v. Bethill*, 1 Rolle's Rep. 420, pl. 8 ; *Andrew's case*, Cro. Eliz. 476, cited.

(*y*) *Morgan v. Tedcastle*, Poph. 55.

(*z*) *Wing v. Earle*, Cro. Eliz. 267.

(*a*) S. 1, c. 74.

shall be the original and genuine standard of that measure of length or lineal extension called a yard ; and that all (*)measures of length shall be taken in parts or multiples, or certain proportions of the said standard yard ; and that one third part of the said standard yard shall be a foot, and the twelfth part of such foot shall be an inch ; *and that the pole or perch in length shall contain five such yards and a half*, it enacts, that(b) all superficial measure shall be computed and ascertained by the said standard yard, or by certain parts, multiples or proportions thereof ; and that the rood of land shall contain 1,210 square yards according to the said standard yard ; and that the acre of land shall contain 4,840 such square yards, being 160 square perches, poles or rods ; and that(c) from and after the 1st day of May 1825, all contracts, bargains, sales and dealings which shall be made or had within any part of the United Kingdom of Great Britain and Ireland, for any goods, wares, merchandise, or other thing to be sold, delivered, done or agreed for *by measure*, where no special agreement shall be made to the contrary, shall be deemed, taken and construed to be made and had according to the standard measures ascertained by this Act ; and in all cases where any special agreement shall be made with reference to any measure established by local custom, *the ratio or proportion which every such local measure shall bear to any of the said standard measures shall be expressed, declared and specified in such agreement, or otherwise such agreement shall be null and void* : and it is then enacted that(d) the several statutes, ordinances, and acts and parts of the several statutes, ordinances and acts thereafter mentioned and specified, so far as the same relate to the ascertaining or establishing any standards of measures, or to the establishing or

(b) S. 2.

(c) S. 15.

(d) S. 23, see 6 Geo. IV. c. 12.

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(*)recognizing certain differences between measures of the same denomination, shall from and after the 1st day of May 1825, be repealed; and the enumeration includes the statutes or ordinances before mentioned in this section, which are therefore repealed.

This Act determines what now in law is the superficial quantity of an acre of land. A question will no doubt arise, whether s. 15 applies to contracts for land under the words "or other thing to be sold," or whether those words are not to be construed *ejusdem generis* with the preceding words, which are "goods, wares, merchandise." At all events, the section applies only to sales *by measure*. But wherever a purchaser is under a contract entitled to statute acres, the measure will be regulated by this Act.

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(*)CHAPTER VII.

OF THE TITLE WHICH A PURCHASER MAY REQUIRE.

I. A PURCHASER before the late Act of 3 & 4 W. 4, c. 27, had a right to require a title commencing at least sixty years previously to the time of his purchase; because the old statute of limitations^(a)(I) could not in a shorter period confer a title. In *Paine v. Meller*^(b), Lord Eldon was of opinion, that an abstract not going farther back than forty-three years, was a serious objection to the title⁽²⁰⁵⁾.

(a) 32 Hen. VIII. c. 2; 21 Jac. I. c. 1. *Vide post*; and see *Barnwell v. Harris*, 1 Taunt. 430.

(b) 6 Ves. jun. 349. See *Robinson v. Elliott*, 1 Russ. 599.

(I) The Courts however were so anxious to protect a long possession, that no plaintiff was entitled to so little favor as a plaintiff in a writ of right. See *Charlwood v. Morgan*, *Baylis v. Manning*, 1 New Rep. 64, 233; *Maidment v. Jukes*, 2 New. Rep. 429.

(205) In *Sergeant v. Ballard*, 9 Pick. 251, the plaintiffs claimed a right of dockage upon the land of the defendant. It was claimed as a prædial service due from the estate of the defendant to the estate of the plaintiffs; and said the court, Putnam J. "it is analogous to the right of watering cattle, conducting water, a right of way, of pasturage, of digging for metals, &c. and a great many other rights and easements, which may be acquired by grant, and by other means in the land of others." The jury at the trial were instructed, that in order to establish the plaintiff's claim, it was not necessary for them to produce any deed, or to prove that any ever existed; the rule being, "that twenty years' occupation alone is sufficient to ground a presumption that the occupation began in virtue of some compact between the parties; but it is to be applied only to cases where the legal qualities of such right are proved to exist. One is, that the occupation must be uninterrupted by the owner of the land; another is, that the occupation must be really adverse, and not by any

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Even sixty years were not sometimes sufficient. For instance, if it might reasonably be presumed from the

permission, license, or indulgence of the owner." One ground for a new trial assigned was because the instructions were erroneous; but the court considered the instructions of the chief Justice upon the point of occupation, very proper. Putnam, J. observed, "We cannot suppose (as was contended for the plaintiffs), that the mere use of the easement for twenty years is conclusive of the right; nor do we think that was the meaning of Story, J. in *Tyler v. Wilkinson*, 4 Mason, 402.—His words were 'by our laws, upon principles of public convenience, the term of twenty years of exclusive uninterrupted enjoyment has been held a conclusive presumption of a grant of right.' He could not have intended an enjoyment which had been by the favor and at the will of the owner for twenty years. The chief Justice further instructed the jury, 'that the plaintiffs could not join the period of the occupation of Governor Hutchinson, before the revolution, to their own subsequent occupation, because the occupation was interrupted from 1774 to 1780.' Such an interruption would be what the civilians call a usurpation; Ayl. Civ. Law. 321, 324; which is a discontinuance given to prescription, in point of time and possession, 'for upon a commencement of usurpation, prescription is destroyed or annihilated, and must begin again; which usurpation may be by "an extra judicial denunciation or claim of right," and especially "by a contestation of suit."'

But the time which an ancestor possessed may be extended and allowed to his heirs; and the same rule applies to buyers and sellers. "*Inter venditorem quoque et emptorem conjungi tempora.*" Just. instin. lib. 2. tit. 6. s. 8. All that would be required by the possessor would be, evidence that the possession had been legally continued from one owner to another. It was therefore a correct instruction which was given by the chief Justice, that the plaintiffs could not *lap on* Governor Hutchinson's time to Parson's, because of the interruption from 1774 to 1780. But the plaintiffs might avail themselves of the continued possession of their ancestors. And if Hutchinson acquired the right before he went away in 1774, it would have passed with the estate in virtue of the confiscation and the deed of the commonwealth to Sergeant and Parsons. But the difficulty of the case on the part of the plaintiffs, is as to the character of the occupation, whether it were adverse, or by favor. *The plaintiffs have the burden of proof.* If they leave it doubtful they are not to prevail. They must not only prove the using for twenty years, which is *here* the 'tempus longum,' but that it was *continued, uninterrupted and adverse*, that is, *under a claim of right*; the owner acquiescing. Dedications of ways do not always rest upon

contents of the abstract, that estates-tail were subsisting, the purchaser might demand the production of the prior title. The statutes of limitation could not in such case be relied on; remainder-men having had distinct and successive rights, upon which at least the statute of James could only begin to operate as they fell into possession. It might have been thought in the common case of a man claiming by descent, a reversion expectant upon particular estates created by his ancestor's will, that a writ of right would not lie after sixty years from his ancestor's death, although the particular estates had but (*)recently determined. But however this might be, the

length of possession, for in 3 Bing. R. 447, the question left to the jury was whether the thorough-fare had been used with *the consent* of the owner of the soil, and not for what *length of time*. A parol dedication is good, and generally the only one made; and although there is no grantee to take, it vests in the public, and is different from ordinary grants, and is construed upon principles to suit the nature of the case; they are similar to the case where a man lays out a street or highway over his own land, where there is no grantee of the easement, yet it takes effect as a grant to the public use, who have the right of passage through, not the absolute property. *White v. The City of Cincinnati*, 6 Peter's R. 432. So, in the case of *Wyman v. The Mayor of N. Y.* 11 Wend. R. 486, where a vendor sold lots according to the *city map* on which his estate was laid down as divided into blocks, streets, &c. held: that he impliedly granted the right or privilege to the purchaser of having such streets, &c.:—and where the conveyance itself bounds the lot upon a street of a particular width, or as lying within a certain distance from the street, the dimensions and locality of which are described with sufficient certainty in the deed, and the grantor is the owner of the land upon which the supposed street is located, the grant of the privilege of such a street may well be implied. A similar implication arises when a conveyance is made with reference to a map or town plot on which the streets are laid down. In the case of *Lewis street*, 2 Wend. R. 472, “the principle was established, that in the city of New-York the purchasers of lots bounded upon streets not yet opened, are not subject to any assessment for opening such streets, to pay the owner for the value of the land, the presumption being that an enhanced price was paid for the lots, in consideration of being upon a street or streets. S. P. 8 Wend. 85.

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objection still remained, for an ejectment might have been brought at any time within twenty years after the estate fell into possession.

So, if an abstract begin with a conveyance by a person who is stated to be heir at law of any person, the purchaser may require proof of the ancestor's intestacy.

To pursue this point is, in this place, impracticable, so numerous are the cases in which counsel are compelled to require the production of the prior title.

But the law is altogether altered by the 3 & 4 Will. 4. c. 27(c), which limits the general time to recover to twenty years, with a saving of ten years for persons under disability, but not to exceed in any case forty years, although the ten years are not expired. The Act allows no further time for successive disabilities, and makes the bar of the tenant, in fact, extend to all whom he might have barred. This will ultimately tend to shorten abstracts considerably, and in the result forty years will probably be considered the proper period instead of sixty for an abstract to extend over, but still cases must frequently arise where it will be necessary to call for an earlier title. As fines are abolished, a short bar, as formerly, cannot now be made.

Of course a purchaser may, after notice of a defect in the title, by his conduct wave the objection; but Lord Eldon has determined, that where an abstract is laid before counsel, who approves the title, his approbation is not to be taken as against the person consulting him, as a waiver of all reasonable objections. The Court cannot compel a specific performance upon the ground of an opinion which it may think wrong. The purchaser may either take an opinion from some other counsel, or the (*)one first consulted may correct his error in a further

(c) See *post*, for a full abstract of the Act.
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opinion(*d*). This, it may be observed, was always the understanding of the Profession.

The right to a good title is a right not growing out of the agreement between the parties, but which is given by law. A purchaser, therefore, may wave his right, by concluding an agreement after he has full notice that he is not to expect a title beyond a limited period. That may be matter of notice and not of contract(*e*). And the vendor may of course stipulate that the purchaser shall accept the title such as it is(*f*).

II. Under this head we must consider the much agitated point, whether a purchaser of a leasehold estate can insist upon the production of the lessor's title.

The general practice of the Profession is to call for an abstract of the title, but a lessee is not often able to comply with the demand. At the time the lease is granted, the title is rarely investigated, or even thought of; and a lessor cannot be advised voluntarily to submit his title to the examination of strangers. As my Lord Eldon remarked(*g*), the Newcastle case is a good lesson upon this subject of production. The corporation produced their charters to satisfy curiosity; some persons got hold of them, and the consequence was, the corporation lost 7,000*l.* a year.

The numerous cases in the books where lessees, and persons claiming under them, have been evicted on account of defects in the titles of their lessors, strongly evince the danger of taking a lease without investigating the landlord's title. No title can be depended upon, (*)however long the estate may have been in the same

(*d*) *Deverell v. Lord Bolton*, 18 Ves. 505.

(*e*) See 3 Mer. 64.

(*f*) *Wilmot v. Wilkinson*, 6 Barn. & Cress. 506.

(*g*) 8 Ves. jun. 141.

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family. There may be a defect in a settlement, or the person in possession may have a partial estate only, with a power of leasing. All the leases of the Pulteney estate were set aside on account of a power of leasing not having been duly pursued: nor is this the only estate of which the leases have been vacated. Besides, without an abstract of the title, a purchaser cannot even ascertain that the lessor had not mortgaged the estate previously to granting the lease, in which case (as against the mortgagee) the lessee, and consequently any purchaser from him, would be a mere tenant at will(*h*); and his only remedy would be either to redeem the mortgage, or to bring an action on the lessor's covenant for quiet enjoyment.

A lessee is a purchaser *pro tanto*, and it should therefore seem that *he* is not only entitled to call upon the lessor for an inspection of his title, but would not meet with any favor if he neglected to do so; for no one's misfortune is so much slighted by the courts as his, who buys a thing in the realty, and does not look into the title(*i*). In *Keech v. Hall*(*j*), Lord Mansfield appears to have taken it for granted, that a lessee has a right to examine the title deeds. The case of *Gwillim v. Stone*(*k*), seems to lean the other way, although there, the plaintiff appears to have mistaken his remedy, and the decision in effect only was, that a man entering under an agreement for a lease, before the lease is granted, cannot call upon the other party to reimburse him his loss in case a title cannot be made: although certainly Mr. Justice Lawrence seems to have thought, that the mere agreement to

(*h*) *Keech v. Hall*, Dougl. 21.

(*i*) See *Roswell v. Vaughan*, Cro. Jac. 196; and *Lysney v. Selby*, 2 Lord Raym. 1118.

(*j*) Dougl. 21; and see *Waring v. Mackreth*, Forr. Ex. Rep. 129; 11 Ves. jun. 343.

(*k*) 3 Taunt. 433.

(*)grant the lease did not warrant an implied agreement to make a good title, or to deliver an abstract.

In a later case^(l) Gibbs, C. J. thought that at *nisi prius*, that the defendant was not bound to deliver an abstract under a bare agreement to grant a lease for twenty-one years; and Mr. Justice Heath, after instancing the case of leases for three lives, granted some years since in Devonshire, by a Duchess of Bolton, who was mere tenant for life, but assumed to have a power of leasing, and received fines to the amount of 29,000*l.* observed, that nevertheless it had never yet been heard of, that a tenant for life was asked to show his title to lease. The instance quoted shows the strong necessity of the title being produced; and there is no instance in which a man acting under good advice, accepts a title from a tenant for life, without the production of the settlement under which he claims. However, in this case, the Court considered that the cause originated in a dispute between the two attornies, and the Judges expressed their desire not to decide the point, without affording an opportunity for a review of their judgment. But in the later case of *Roper v. Coombes*^(m), where the agreement was to grant a lease for a large premium, the contract was considered to be for the *sale* of a lease, and as the intended lessor had no right to grant it, the other party was allowed to recover back his deposit.

In the last equity case on this subject, where the agreement was made to take a lease for twenty-one years at rack-rent, the Master of the Rolls decided, that the intended lessor, *who was plaintiff*, could not enforce a specific performance, without producing the original lessor's title⁽ⁿ⁾. But it still remains undecided,

^(l) Temple *v.* Brown, 6 Taunt. 60.

^(m) 6 Barn. & Cress. 534.

⁽ⁿ⁾ Fildes *v.* Hooker, 2 Mer. 424; Lord Ossulston *v.* Deverell, 26 May 1818, MS.

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(*)whether a *lessee* can, as plaintiff, call for the original lessor's title.

The argument generally urged against a *purchaser's* right to call for the lessor's title is, that a lessee is seldom able to produce the title; and, therefore, on the ground of convenience, a purchaser must be presumed to know this circumstance, and to buy, subject to an implied condition, not to call for the freehold title. But the answer to this is, that the lessor's title is now generally required; and where the vendor cannot produce the title, it is usual to state the fact in the particular or agreement. Therefore, where that statement is omitted, it is fair to presume that the vendor is in possession of the title. There can be no inconvenience in establishing the purchaser's right to call for the freehold title; for the vendor has it in his power to prevent the claim by an express stipulation.

Of course, if a vendor of a leasehold estate be unable to procure the lessor's title, equity cannot assist the purchaser(o), unless he will dispense with the production of the title to the freehold.

The question under consideration arose in a recent case in the Court of Chancery; and Lord Eldon avoided deciding the abstract point, although he certainly appears to have thought that the better rule would be, that the purchaser is, in the absence of an express stipulation to the contrary, entitled to the production of the lessor's title. He intimated, however, that if ever it should be his duty to decide a question so important, he would call in the Judges to his assistance.

The case before Lord Eldon has decided that the vendor cannot demand a specific performance if the purchaser can show that the title to the freehold is not good, or that there are any incumbrances on it; nor will equity (*)afford its aid against the purchaser, where the nature

(o) *Vide supra*, p. 208.

(*334) (*335)

of the leasehold title is misrepresented. The facts were these: the interest was described as fifty years, the residue of a term free from incumbrances, whereas it appeared that there were only sixteen years to come of the old lease, granted by Sir Richard Grosvenor in 1722, and the residue of the fifty years was granted by the trustees of Lord Grosvenor in 1791, as a reversionary term for thirty-four years. It appeared, that in 1785, the estate in question was charged with jointures, mortgages, &c. Lord Eldon held, that in these cases a purchaser should at least know accurately what he is buying; that in the case before him, the title produced did not correspond with that contracted for; and that there was a wide difference between the residue of a lease that has existed for a century with possession under it, and a small residue of an old term, and a reversionary lease granted by persons whose title from the first lessor is not deduced. He also thought that he was bound to look at the incumbrances, and therefore dismissed the bill, but without costs(*p*). But when it is stated that the property is held under two leases at one rent for a stated term, it must be understood that the leases are consecutive ones(*q*).

The general point was decided in favor of the purchaser's right in the case of *Purvis v. Rayer*(*r*) in the Exchequer. An agreement was entered into on the (*)15th May 1819, between John Goldsborough Ravenshaw (as the agent of Purvis) of the one part, and

(*p*) *White v. Foljambe*, 11 Ves. jun. 337; *Deverell v. Lord Bolton*, 18 Ves. 505; and see *Radcliff v. Warrington*, 12 Ves. jun. 326; *Lady Saltoun v. Philips*, sittings after T. T. 1813, cor. Lord Ellenborough, where a purchaser recovered his deposit, because the seller claimed his lease subject to Lord Grosvenor's incumbrances, and had stated that the lease was only subject to the ground-rent, although he had not undertaken to produce the landlord's title. See 9 Price, 515.

(*q*) *Spratt v. Jeffery*, 10 Barn. & Cress. 249.

(*r*) 28 July 1821, MS.; S. C. 9 Price, 488.

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William Rayer of the other part; whereby Ravenshaw agreed to sell, and Rayer agreed to purchase a house in Bath, held for the remainder of a term of years under the corporation of Bath and the late Richard Atwood, at the sum of 1,500*l.*; an abstract to be made and delivered by Purvis, and the assignment to be at the expense of Rayer. The purchase-money to be paid on or before Midsummer, when the deeds were to be signed. The ground-rent and all outgoings to Midsummer to be paid by Purvis, from whence the same were to be paid by Rayer. The bill was filed by the seller, and the title was referred to the Master, who reported that the plaintiff could not make a good title to the said leasehold premises. The report was grounded on the non-production of the lessor's title. The plaintiff excepted to the report. The Chief Baron overruled the exception. His Lordship observed that the question was, whether, when a man sells a leasehold estate, he could compel the purchaser to take it without showing him his title. *White v. Foljambe* was the first case on this point. There was no case that went the length of showing that a lessor is not bound to show his title. This was a lease from a corporation; and the general rule is, that where a vendor offers any thing for sale, the vendee is entitled to have the thing he buys with a moral certainty that he has the thing he buys. If a man sell an inheritance, he must show a title to the inheritance: so if a life estate. Then what is the difference where a lease is sold? It is said, however, that this is an anomalous case; but the law has not said so, nor has it been so considered in any of the decided cases. Then it is objected, that a lessor has not the means of compelling the inspection of his lessor's title; that is true, but furnishes no ground for an exception. A lessee may (*)insist on looking into his lessor's title, or that he should produce it; but if he omits to do so, is that any reason why the vendee of a lease should be deprived of those

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advantages? Another course is, to state in the advertisement that you cannot show the title. Therefore, though after the lease is granted the lessee cannot compel the production of his lessor's title, there is no reason why the vendee should be put to any risk. Then is there a good title here; the lease is made in 1774; does the length of time make the lease good? Suppose it had been made by a tenant for life; a tenant for life might live for forty-five years; forty-five years possession would not be good evidence of a title to the inheritance; but then it is said, this was a lease by a corporation. His Lordship was of opinion that there might be circumstances which might make an alteration; but here there was no act of ownership prior to 1774, no prior leases. A tenant for life might have conveyed in fee to a corporation, but on the death of the tenant for life, the estate would cease. This case, therefore, did not differ from the case of a lease from an individual.

If a purchaser of a leasehold estate had notice, at the time he entered into the contract for purchase, of the vendor's inability to produce the lessor's title, he would not afterwards be allowed to insist on its production. Wherever, therefore, a vendor of a leasehold estate has not an abstract of the lessor's title, this circumstance should be mentioned in the particulars of sale, if sold by auction; or in the agreement, if sold by private contract. And if the purchaser agree to accept a proper assignment, without requiring the lessor's title, he will at law be compelled to pay the price, although the lessor's title prove to be bad(s). And a purchaser of an estate (*)held under a bishop's lease, cannot call for the lessor's title(t).

It seems formerly to have been thought, that a plaintiff

(s) *Spratt v. Jeffery*, 10 Barn. Cress. 249.

(t) *Fane v. Spencer*, 2 Mer. 430.

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in an ejectment for a leasehold estate, could not recover unless the original lease and all the mesne assignments were proved; but this rule has been relaxed, and where the possession had been uniform, the jury will be recommended to presume any old assignments which have been lost(*u*). It cannot, however, be laid down as a general rule, that a purchaser of a leasehold estate can safely accept the title where any of the mesne assignments have been lost, although he might be able to recover in ejectment, if he actually did purchase. Every case of this nature must depend upon its own particular circumstances(*x*).

If the title deeds are lost, the seller must furnish the purchaser with the means of showing what were the contents of the deeds, and of proving that they were duly executed, even where the deeds are accidentally destroyed by fire after the contract is made(*y*).

With respect to the title to renewable leaseholds, great difficulty constantly occurs. All public bodies who grant renewable leases, require the old lease to be given up before they will grant a new one; and when they once obtain possession of a surrendered lease, they will not part with it, or permit a copy of it to be taken. When the lessee sells, he produces an abstract of the subsisting lease and subsequent instruments. Now this is a title which it is impossible to accept, however willing the purchaser may be, and although he may have waved calling for the lessor's title. Every lease is stated to be granted in consideration of the surrender of the former lease, and by means of this reference (*) the chain of title is kept up. The reference in the last lease to the one immediately preceding, is notice of it to the purchaser, and that again is notice of the one before

(*u*) *Earl v. Baxter*, 2 Blackst. 1228. See 11 Ves. jun. 350.

(*x*) *Vide post*. *Hillary v. Waller*.

(*y*) *Bryant v. Busk*, 4 Russ, 1.

that, and so on to the first lease. And if in any of these leases the lessee is described as devisee under a will, or there is any thing to lead the mind to a conclusion that the lessee is not absolutely entitled, the purchaser will be liable to the same equity as the lessee was subject to, although he, the purchaser, had no other knowledge of the fact, than the mention in the lease of the surrender of the former lease, equity deeming that sufficient to lead him to inquire into the title(z). Harsh as this rule may seem, it is quite consistent with the general principles of equity, and is imperiously called for in this case, because public bodies generally renew with the person having the legal estate, and seldom suffer any trusts to appear on the lease, lest they should be implicated in the execution of them.

Although a purchaser buys with full notice that a title cannot be made without the consent of a third person, yet it lies on the seller and not on the purchaser to obtain the consent. It cannot be inferred that the seller only agreed to part with his interest in the estate as far as he was able to do so(a).

III. To enable equity to enforce a specific performance against a purchaser, the title to the estate ought, like Cæsar's wife, to be free even from suspicion(b); for it would be an extraordinary proceeding for a court of equity to compel a purchaser to take an estate which it cannot warrant to him(c). It hath, therefore, become a settled and invariable rule, that a purchaser shall not be compelled (*) to accept a doubtful title(d)(206); neither will

(z) *Coppin v. Fernyhough*, 2 Bro. C. C. 291.

(a) *Lloyd v. Crispe*, 5 Taunt. 249; *Mason v. Corder*, 2 Marsh. 332; 7 Taunt. 9.

(b) See 2 Ves. 59.

(c) *Heath v. Heath*, 1 Bro. C. C. 147.

(d) *Marlow v. Smith*, 2 P. Wms. 198; *Mitchel v. Neale*, 2 Ves.

(206) See *Butler v. O'Hear*, 1 Des. 382. *M'Comb v. Wright*, 4 (*340)

he be forced to take an equitable title(e) nor will a case be directed to the Judges as to the title unless, the purchaser be willing that it should(f); and even if a case should be directed, and the Judges were to certify in favor of the title, yet a specific performance would not be decreed unless the Court itself were satisfied of the equitable as well as the legal title of the vendor(g). And although the Judges certify in favor of the title, and there is no equitable objection to it, yet if the point of law is doubtful, the purchaser may require another case to be directed, which it seems will not be sent back to the same court(h). If exceptions be taken to the Master's report in favor of the title, and the Court think the title a doubtful one, the bill may upon further directions be dismissed without either overruling or allowing the exceptions(i).

And even the house of Lords, sitting as a court of equity upon appeal, will not in all cases decide the point, but if they think it a doubtful one will discharge the

679; *Shapland v. Smith*, 1 Bro. C. C. 74; *Cooper v. Denne*, 4 Bro. C. C. 80; 1 Ves. jun. 565, S. C.; *Crewe v. Dicken*, 4 Ves. jun. 97; *Rose v. Calland*, 5 Ves. jun. 186; *Roake v. Kidd*, *ibid.* 647; *Wheate v. Hall*, 17 Ves. jun. 80; *Sloper v. Fish*, Rolls, 29 July 1813; 2 Ves. & Bea. 145; *Jervoise v. Duke of Northumberland*, 1 Jac. & Walk. 559; *Price v. Strange*, 6 Madd. 159.

(e) *Cooper v. Denne*, *ubi sup.*; and see 2 Ves. jun. 100; and *infra*.

(f) *Roake v. Kidd*, *ubi sup.*; *Sharp v. Ardcock*, 4 Russ. 374.

(g) *Sheffield v. Lord Mulgrave*, 2 Ves. jun. 526.

(h) *Trent v. Hanning*, 10 Ves. jun. 500.

(i) *Willcox v. Bellaers*, 1 Turn. & Russ. 491.

Johns. Ch. Rep. 659. *Kelley v. Bradford*, 3 Bibb, 317. But where a purchaser proceeds in the treaty for a purchase, after he is acquainted with the title, and the nature of the tenure, and does not object to it, he will be bound to fulfil his contract; though a court of equity might give some relief, if, ultimately, the title should turn out to be really bad. *Roach v. Rutherford*, 4 Des. 126, 135. See also, *Beverley v. Lawson's heirs*, 3 Munf. 317, 338. *Mayo v. Purcell*, 3 Munf. 243.

purchaser from the contract, with costs(*k*). It is, however, to be regretted that such a rule should have been adopted.

The doubt generally turns upon a point of law, but (*)the rule equally applies to other cases. Therefore where a testator, who appeared to be seised of the entirety of an estate, devised his undivided moiety, or half part of it, and all other his shares, proportions and interests if any therein; and no evidence appeared that he had not the entirety, and the words were sufficient, if he had, to pass it; Lord Eldon was of opinion that the title was good; but he was also of opinion that this was not a reasonably clear marketable title, with that doubt as to the evidence of it, which must always create difficulty in parting with it, and therefore he refused to force the title on a purchaser(*l*).

So there are many cases in which a jury will collect the fact of legitimacy from circumstances, in which it might be attended with so much reasonable doubt, that equity would not compel a purchaser to take it merely because there was such a verdict. The Court ought to weigh, whether the doubt is so reasonable and fair, that the property is left in his hands not marketable(*m*).

Whether where an action is brought against a purchaser for non-performance of an agreement, a court of law will act upon this doctrine, is doubtful. In a case before Lord Kenyon at *nisi prius*(*n*), where an objection was made to the title, his Lordship said he would not then determine the point, nor was it necessary to do so. He thought it a question of some nicety; but whether it was or not, he thought it equally a defence to the action. When a man

(*k*) *Blosse v. Clanmorris*, 3 Bligh, 62.

(*l*) *Stapylton v. Scott*, 16 Ves. jun. 272. See 1 Ves. & Beam. 493; and see and consider *Hartley v. Smith*, 1 Buck, 368.

(*m*) *Per* Lord Eldon. See 8 Ves. jun. 428.

(*n*) *Hartley v. Peahall*, Peake's C. 131; *Wilde v. Fort*, 4 Taunt. 334. (*341)

buys a commodity, he expects to have a clear indisputable title, and not such a one as may be questionable, at least, (*)in a court of law(1)(207). No man is obliged to buy a lawsuit; and a verdict was given for the purchaser. But in a later case(o), where at law the same argument was urged on behalf of a purchaser who was plaintiff, Lord C. J. Gibbs said, it was intimated that if any doubt could be cast on the title of the vendor, the plaintiff would be entitled to recover back his deposit. Now, if he had gone into a court of equity, the Chancellor would not, perhaps, have obliged an unwilling purchaser to ratify the contract. But if he come into a court of law to recover the deposit, on the ground of an insufficient title, he must abide by the decision of that court, and that is the difficulty which the party had brought upon himself by coming into a court of law. This seems to be the true rule.

In a late case, where the estate was sold without any notice, that it was recently allotted under an inclosure act, and it appeared *that the commissioners had not made their award*, and the act contained no clause authorizing a sale before the award; Lord Ellenborough held, that the purchaser was warranted in refusing the title(p). But if the purchaser is at the time of the contract aware that the estate is in a progressive state of inclosure, and there is no ground to suppose that the commissioners will vary the allotments, assuming their power to do so, the pur-

(o) *Romilly v. James*, 1 Marsh. 600.

(p) *Lowndes v. Bray*, Sitt. after T. Term, 1810; *Cane v. Baldwin*, 1 Stark. 65; *Farrer v. Billing*, 2 Barn. & Ald. 171.

(I) This expression seems to refer to the question, whether equitable objections to a title are a defence at law. *Vide supra*, p. 243.

(207) See *Roach v. Rutherford*, 4 Des. 133.

chaser will be compelled to take the title although the award is not executed(*q*).

(*)Where an act of bankruptcy has been committed, the purchaser cannot be compelled to take the title, although the vendor swear that he owes no debt upon which a commission can issue, and the purchaser cannot disprove the statement. The ground of this determination was, the impossibility of ascertaining that there was not such a debt as would support a commission(*r*). And upon the same principle, a purchaser who has become bankrupt cannot compel a conveyance of the estate to him ; because he cannot satisfy the vendor that he will be entitled to retain the purchase-money(*s*).

So, where an estate is sold subject to a rent, which, although not so stated, appears to be only part of a larger rent charged on that and other property, the purchaser will not be bound to take the title, although for many years the apportioned rent has been received(208) : an apportionment by deed must be shown. It is the duty of the vendor to give the purchaser a complete formal discharge of all the further rent that the house was ever liable to. Although an apportionment may be presumed, yet, as Mr. Justice Chambre observed, the question here is not what may be presumed, but whether a purchaser is compellable to accept a purchase, where his title rests only on presumption, which may be rebutted by other evidence. And Lord Chief Justice Mansfield said, that a court of equity would not decree a specific performance in a case like this, unless the seller could procure the

(*q*) *Kingsley v. Young*, MS. ; S. C. 17 Ves. jun. 463, affirmed on an appeal by Lord Eldon. The act authorized a sale before the award.

(*r*) *Lowe v. Lush*, 14 Ves. jun. 547 ; *Cann v. Cann*, 1 Sim. & Stu. 284.

(*s*) *Franklin v. Lord Brownlow*, 14 Ves. jun. 550.

(208) See *Ten Broeck v. Livingston*, 1 Johns. Ch. Rep. 357.

(*343)

ground-landlord to apportion the rent, by joining in an assignment of the lease ; in which assignment the apportioned rent should appear(*t*).

But where an apportioned rent is sold, if the rent is (*)an apportioned rent, the purchaser cannot object that he will not have the same remedies as if the rent were entire(*u*).

So where an estate, held under one lease, is sold in lots, and the fact is stated, and it is stipulated that the purchaser of one particular lot is to be subject to the whole of the rent, the other purchasers cannot object to the title, although there is a clause of re-entry on non-payment of the rent contained in the lease(*x*).

In a case where an estate was sold in lots, and one of the conditions stated that the estate was subject to the perpetual payment of 120*l.* to the curate of A., but the same and a perpetual annual payment to the hospital of B. were in future *to be charged upon* and paid by the purchaser of lot 1. only ; it was held, that the purchasers of the other lots were only entitled to such an indemnity as could be made by the purchaser of lot 1. to the purchasers of the other lots(*y*).

Where the estate agreed to be leased was comprised with others in an original lease, under which the lessor had a right to re-enter for breach of covenants, so that the under-lessee might be evicted without any breach on his part, it was held, by Sir John Leach, Vice-Chancellor, that he was not bound to accept the title with an indemnity. His Honor observed, that where a party comes for a specific performance, he desires the Court to give the party

(*t*) *Barnwell v. Harris*, 1 Taunt. 430.

(*u*) So held by the V. C. in *Bliss v. Collins*, reported in 4 Madd. 229. See S. C. 1 Jac. & Walk. 426 ; *Walter v. Maunde*, 1 Jac. & Walk. 181.

(*x*) *Walter v. Maunde*, *ubi sup.*

(*y*) *Cassamajor v. Strode*, 2 Swanst. 347 ; 1 Wils. Cha. Ca. 428.

the specific subject. Now here he could not secure the possession of the subject upon the terms agreed upon. But he offers an *indemnity*. The lessee might be evicted, and therefore it was compensation and not indemnity that was offered. I will give you the subject of the contract (*)not with a sure title, but with a compensation in case of eviction. It was not a case for an indemnity, and the Court could not compel a performance with a compensation(z).

In a late case(a), upon a purchase, it was agreed, that if there should be found any fee-farm rents, or quit-rents, chargeable on the same, an allowance should be made at the rate of thirty years purchase on the amount thereof. It appeared that the estate, with others of great value, was charged with a perpetual rent of forty marks, originally reserved to the Crown ; but a similar rent was granted to trustees in fee, in the usual way, out of a part of the estate not sold, of nearly ten times the annual value of the rent, as an indemnity to the other estates against the rent. It was objected, that this charge prevented the seller from making a good title. It was argued, on the part of the seller, that this was the precise case in which a purchaser would be compelled to take a title with an indemnity. Equity looks only to the substantial execution of the contract ; and here the rent was not, *in substance*, a charge on the land. It was not like the case of a lease, where non-payment of the rent, or non-performance of the covenants, might avoid the estate of the person who was required to accept the indemnity ; but this was the simple case of a money payment, which would, of course, be accepted from the owner of the estate exclu-

(z) *Fildes v. Hooker*, 3d April 1818, MS. ; 3 Madd. 193 ; *Warren v. Richardson*, 1 You. 1.

(a) *Hays v. Bailey*, Rolls, 10 Aug. 1813, MS. *vide infra*. See *Cassamajor v. Strode*, 1 Wils. Cha. Ca. 428.

(*345)

sively charged with it, by way of indemnity ; and which estate would always be liable to answer any payment made on account of the rent by the persons intended to be indemnified against it. The objection, if allowed, would affect half the titles in the kingdom. It applies (*)to nearly all the estates which came into the hands of the Crown on the dissolution of the monasteries. *Dickenson v. Dickenson*(*b*) was a stronger case ; for there the purchaser was compelled to take the title, although the Judge was of opinion, that if, in the event, the fund should turn out deficient for payment of the infant's legacies, he must still have recourse to the estate for the deficiency. The ground of the decision must have been, that there was no chance of the fund proving deficient. *Halsey v. Grant*(*c*) is a direct authority in favor of the seller ; and there the indemnity fund was not so large with reference to the amount of the charge as the present ; and although *Horniblow v. Shirley*(*d*), was a case of compensation, and not of indemnity, yet it appears that Lord Alvanley said, that if such an objection was to prevail, a purchaser of a portion of a large estate would always be at liberty to get rid of a contract(*e*). In the present case, the purchaser did not object to the estate being charged with a fee-farm rent, provided he was paid its value. Here the rent is charged only in point of form ; and therefore he can require no allowance. On the part of the purchaser, it was argued, that the clause relied upon, on the other side, was evidence that the purchaser was not to take the estate subject to any rent, unless it could be sold to him ; and the estate would always be liable to the fee-farm rent, notwithstanding the indemnity. The Master of the Rolls was of opinion, that the clause in the agreement referred to a rent

(*b*) 3 Bro. C. C. 19.

(*d*) 13 Ves. jun. 8.

(*c*) 13 Ves. jun. 73.

(*e*) 13 Ves. jun. 75.

charging the estate sold only, and not to a rent charging it and other estates; and that the Master was justified in considering the rent as an objection to the title. As to the question of indemnity, his Honor observed, that (*)Halsey and Grant was certainly a case of indemnity; and Horniblow and Shirley a case of compensation; but he doubted whether the deed executed in order to relieve the estate in question, could be considered such an indemnity as a purchaser ought to be compelled to accept, nor should he decide whether in this case any indemnity could or ought to be given by the vendor against such fee-farm rent. He should leave that to be decided when the cause came on to be heard thereafter.

Upon an appeal to the Lord Chancellor, he affirmed the decision of Sir William Grant, on the ground that the rent in question did not fall within the condition; and his Lordship treated the early cases as not being authorities, and held that a seller was bound accurately to describe what he was selling(*f*)(209).

In the case of *Fildes v. Hooker*(*g*), Sir John Leach, Vice-Chancellor, observed, that the utmost length of indemnity was, that if a good title can be made subject to an incumbrance, the purchaser shall take the title, with a security protecting him against the incumbrance. He did not know that the Court had gone so far, and he should not be disposed to follow such a rule, because the purchaser is entitled to an estate free from incumbrance. It would be difficult to convince him that such a rule was right.

(*f*) M. T. 1821, MS.

(*g*) 3d April 1818, MS.; 3 Madd. 193.

(209) Where there was a contract for the conveyance of land, parcel of a large tract, subject to a quit rent, which had not been demanded for above 60 years, such incumbrance, if any, was held to be no objection to a decree of specific performance. *Ten Broeck v. Livingston*, 1 Johns. Ch. Rep. 357.

(*847)

It hath before been observed, that a purchaser will not be compelled to take an equitable title ; but this rule does not extend to estates sold before a Master under the decree of a court of equity. For in this case, although the legal estate is outstanding, and cannot be immediately got in, yet if the person seised of the legal estate is a party to the suit, the Court will compel the purchaser to accept the title, and will decree generally that the (*)legal tenant shall convey, and that the purchaser shall in the mean time hold and enjoy.

And even where the legal estate is vested in an infant, the Court will compel the purchaser to complete his contract on the usual decree, that the infant shall convey when he comes of age, *unless he then shows cause to the contrary* ; and that the purchaser shall in the mean time hold and enjoy.

Thus in a case(*h*) where, upon sale of an estate before a Master, in pursuance of a decree under Lord Waltham's will, the purchaser objected to the title, on the ground of the legal estate being in an infant ; Lord Rosslyn, without the least hesitation, compelled the purchaser to take the title, making his decree for the infant to convey in the usual form ; because, as the purchaser bought under the decree, he was bound to accept such a title as the Court could make him(*i*). And I learn that in a case of this nature, Lord Rosslyn would not sanction an application by the purchaser, at his own expense, for an act of parliament to divest the infant of the legal estate. Nor, if the estate be copyhold, will the Court retain any part of the purchase-money in order to defray the expense of the

(*h*) Ch. MS. See *Chandler v. Beard*, 1 Dick. 392.

(*i*) But note, a purchaser under a decree will not be compelled to take a *doubtful* title. See *Marlow v. Smith*, 2 P. Wms. 198 ; *Shaw v. Wright*, 3 Ves. jun. 22 ; *Noel v. Weston*, Coop. 138.

fine that would be payable, in case the infant heir should die before he surrendered(*k*).

But although a purchaser *under a decree* will be compelled to accept a title of this nature, yet, if he sell the estate, the Court will not enforce a specific performance against the second purchaser.

This was also decided by Lord Rosslyn. The purchaser of Lord Waltham's estate sold the estate to a person (*)who objected to the title upon the same ground as he had objected to it, and refused to complete the contract. The first purchaser very confidently filed a bill for a specific performance, but Lord Rosslyn dismissed it; because such second purchaser *did not buy under the decree*, and therefore was not compellable to accept an equitable title(*l*).

But where the estate is not sold by the Court, although the purchaser agree to go before the Master upon a reference of title in a suit in Court for the administration of the estate, yet he is not bound to take an equitable title(*m*).

In a case where a seller after the contract died intestate, leaving an infant heir, who filed a bill against the purchaser, praying that he might elect either to complete or abandon the contract; and the purchaser submitted to perform the contract, and paid the purchase-money into court, the Maser of the Rolls refused to pay it out without the consent of the purchaser during the infancy of the heir(*n*).

In another case, where after a contract for sale the seller died intestate, leaving an infant heir, and his widow,

(*k*) *Morris v. Clarkson*, 1 Jac. & Walk. 604, n.; 3 Swanst. 558.

(*l*) *Powell v. Powell*, 6 Madd. 53.

(*m*) *Cann v. Cann*, 1 Sim. & Stu. 284.

(*n*) *Bullock v. Bullock*, 1 Jac. & Walk. 603.

(*349)

who was his administratrix, filed a bill for a specific performance against the purchaser and the heir, it was decreed, and a day given to the heir to show cause(o). But the objection, that the purchaser was not bound to accept the title in consequence of the infancy of the heir, was not taken.

The reason why a purchaser under a decree is compelled to take an equitable title seems to be this, that the Court has bound the right of the party in whom the legal (*)estate is vested, and will not permit him to take advantage of it. This, however, is not the case where the legal estate is in an infant ; as it makes part of the decree, that he shall convey when he comes of age, *unless he then shows cause to the contrary*.

In favor of the rule, by which a purchaser under a decree is compellable to take an equitable title, it may be said, that it facilitates sales under the decrees of the Court ; but the injustice of it is too glaring. The decree of a court of equity acts *in personam*, and not like a judgment at law, *in rem* ; and it is possible that the Court may never be able to compel the person seised of the legal estate to convey it to the purchaser.

But the Acts of the 1 W. 4, to which we have already referred(o), remove most of these anomalies by enabling the Court to make a good legal title. With this view, as we have seen, a tenant for life may convey the inheritance ; an infant may convey as if he were an adult ; and a committee may convey in the place of the lunatic.

Although an estate is not sold under a decree, and the legal estate appears to be outstanding, and cannot be got in, yet, if the circumstances of the case are such as would induce a court of law, under those grounds upon

(o) *Holland v. Hill*, Rolls, 18 Mar. 1818, MS. ; *King v. Turner*, 2 Sim. 549.

(o) *Supra*, p. 192.

which presumptions are in general raised, to presume a reconveyance, the purchaser will be compelled to take the title(*p*). Reconveyances have been frequently presumed upon trials at law in favor of justice ; but this doctrine was never applied to a contract between a vendor (*)and purchaser, until the case of *Hillary v. Waller*, which certainly has not met with the approbation of the bar. The decision has occasioned considerable difficulties in practice. As no man can say where exactly the line is to be drawn, at what period the presumption is to arise, and what circumstances are sufficient to rebut it, each party puts his own construction on almost every case which arises. This, of course, leads to endless discussion and expense, and the very parties in whose favor the doctrine was introduced, ultimately feel how much it would have been to their interest, that the general rule of the Profession had not been relaxed. This rule was, that a vendor was bound to get in all outstanding legal estates, which were not barred by the statutes of limitations. The certainty of the rule amply compensated for any individual hardship which it might sometimes occasion. And now that the time is shortened by the late statute of limitations, there is less room than before for presuming a conveyance of a legal estate against a purchaser(210).

(*p*) *Hillary v. Waller*, 12 Ves. jun. 239 ; *Emery v. Growcock, ex parte Holman*, *post.* ch. 9, s. 2, div. iv ; but see *Goodright v. Swymer*, 1 Kenyon, 385 ; *Keene v. Deardon*, 8 East, 248 ; *Doe v. Brightwen*, 10 East, 583, which show that the circumstance of the equitable estate being in the person who claims the benefit of the presumption, is not sufficient of itself to raise it ; and see *Barnwell v. Harris*, 1 Taunt. 430 ; *Doe v. Calvert*, 5 Taunt. 170 ; *Cooke v. Soltau*, 2 Sim. & Stu. 154 ; and see 10 Barn. & Cress. 312 ; *Noel v. Bewley*, 3 Sim. 103.

(210) In *Clark v. Redman*, 1 Blackf. R. 379, where the plaintiffs gave to defendant their bond conditioned for making a lawful title upon his payment of the purchase money ; held, that the obligors were bound to make a perfect title with a general covenant of warranty. The bond (*351)

We have seen, that a purchaser cannot be compelled to take a *doubtful* title ; but, nevertheless, he will not be permitted to object to a title on account of a bare possibility ; because a court of equity, in carrying agreements into execution, governs itself by a moral certainty : it being impossible, in the nature of things, there should be a mathematical certainty of a good title(211).

Therefore *suggestions* of old entails, or doubts what issue persons have left, whether more or fewer, are never allowed to be objections of such force as to overturn a title to an estate(*q*).

So where(*r*), upon a purchase, it appeared that the (*)estate had been originally granted by the Crown, in which grant there was a reservation of tin, lead, and all royal mines, without a right of entry ; yet, as there had been no search made for royal mines for one hundred and

(*q*) See 2 Atk. 20, *per* Lord Hardwicke ; and see Lord Braybroke *v.* Inskip, 8 Ves. jun. 417 ; Dyke *v.* Sylvester, 21 Ves. jun. 126.

(*r*) Lyddal *v.* Weston, 2 Atk. 19. See Seaman *v.* Vawdrey, 16 Ves. jun. 390.

was executed by three ; “ by which bond, said the court, these three obligors were bound for a good and perfect title, with a general warranty deed to be executed by them all with their wives. The deed tendered was executed by one and his wife only : defendant was justified in refusing it.”

A contract to make “ a warranty deed, free and clear of all incumbrances,” held, that the construction of such a contract is, that the premises should in fact be free from incumbrances ; and where it appeared at the time of the tender of the deed that one C. had an inchoate right of dower in the same, the court considered that this was an existing incumbrance which justified the defendant in refusing to perform the contract on his part. Porter *v.* Noyes, 2 Greenl. R. 22. And where the plaintiff stipulated to execute a deed with a covenant of warranty, held, that he must have the power to give a deed, which would convey an indefeasible title. Under such a contract a mortgage upon the land is an incumbrance, which will justify the purchaser in refusing the deed. Judson *v.* Wass, 11 Johns. 11.

(211) See *Ten Broeck v. Livingston*, 1 Johns. Ch. Rep. 357.

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eleven years, and, upon examination, the probability was great there were no such mines, and the Crown, for want of a right of entry, could not grant a license to any person to enter and work them, Lord Hardwicke decreed a specific performance.

Again, in a recent case(s), where a man articted for the purchase of an estate, with some valuable mines, and would not complete his contract because the mines were under a common, wherein others had a right of common, and consequently he would be subject to actions for sinking shafts to work the mines; Lord Eldon, after showing the improbability of any obstruction from the commoners, said, that in case such an action were brought, he should think a farthing quite damages enough; and therefore decreed a performance *in specie*.

This case, like the last, must be considered to have turned on the improbability of the purchaser being disturbed; otherwise it seems to have gone to the utmost verge of the law; for although such trifling damages could only be recovered, yet that would not be a ground for a nonsuit, as was decided in the late case of *Pindar v. Wadsworth*(t). The estate, therefore, would subject the purchaser to litigation, whenever malice or caprice might induce any of the commoners to commence actions against him.

So a *mere suspicion* of fraud, which cannot be made out, will not enable a purchaser to reject the title. This was decided by Lord Eldon in a case where, under an exclusive power of appointment, a father appointed to one son in fee; and then the father and his wife and the (*)son joined in conveying to a purchaser, and the money was expressed to be paid to them all. The title was objected to on the ground of an opinion, by which it

(s) Anon. Chan. 7th Sept. 1803, MS.

(t) 2 East, 154.

(*353)

appeared, that the father first sold the estate, and then the appointment was devised to make a title, and the purchase-deed recited that the contract was made with the father and son. And it was insisted that if the father derived any benefit from the agreement, or even made a previous stipulation that his son should join him in a sale, which there appeared the strongest reason to apprehend, it would have been a fraudulent execution. But Lord Eldon overruled the objection, as it did not appear that the estate sold for less than its value, or that the son got less than the value of his reversionary interest, but merely that he, as the owner of the reversion, acceded to the purchase(*u*).

If a seller file a bill for a specific performance, and a third party file a bill against him, claiming a right to the estate, the mere fact of the pendency of the latter suit is not a sufficient reason for a Master's stating that a good title cannot be made, but the nature of the adverse claim should be examined and stated(*x*).

But if any person has a claim upon the estate which he *may* enforce, a purchaser cannot be compelled to take the estate, however improbable it may be that the right will be exercised. Thus, in the case of *Drewe v. Corp(y)*, the vendor was entitled to an absolute term of four thousand years in the estate, and also to a mortgage of the reversion in fee, which was forfeited but not foreclosed. It was decided, that the purchaser who had contracted for a fee, was not bound to take the term of years. Nor was (*)he compelled to take the title on the ground of the vendor having a forfeited mortgage in fee of the rever-

(*u*) *M^cQueen v. Farquhar*, 11 Ves. jun. 467. See *post* ch. 17 ; and see *Barnwall v. Harris*, 1 Taunt. 430 ; *Boswell v. Mendham*, 6 Madd. 373.

(*x*) *Oshaldeston v. Askew*, 1 Russ. 160.

(*y*) *Vide supra*, p. 298.

sion, although it was evidently highly improbable that any one would ever willingly redeem a forfeited mortgage of a dry reversion expectant upon an absolute term of four thousand years.

So in a late case(z), it appeared that in 1704 the estate was sold with a reservation of salt-works, &c. with a right of entry, and the estate was sold in 1761, and no notice taken of the reservation, and the right had never been exercised; the Master of the Rolls was of opinion that non-user did not in this case raise the inference that the right was abandoned, and consequently the purchaser was entitled to take the objection, and his Honor distinguished this from the case of *Lyddal v. Weston*(a); first, because it was not alleged that there was no probability of mines, it was rather admitted that there were: secondly, here was the reservation of a right of entry, upon the want of which Lord Hardwicke laid stress in that case. In the case before his Honor, the purchaser chose to consider this not as an objection to the title, but as a ground for compensation, and it was decreed accordingly.

In a case where a close called the Croyle had always been known by that name, and had been possessed by the seller and his ancestors as part of the estate sold, but no mention was made of it in the deeds by name, and all the other lands were particularly described; the Court considered the evidence of title to be merely that of long possession, and held that the purchaser was not bound to accept the title(b).

But where it is established by evidence that a copyhold (*)estate sold has continually passed and been enjoyed by the description contained in the court rolls, it is not ma-

(z) *Seaman v. Vawdrey*, 16 Ves. jun. 390.

(a) *Supra*, p. 351.

(b) *Eyton v. Dicken*, 4 Price, 303.

(*355)

terial that there is only a general and vague description of the estate on the rolls(c), and the purchaser will be compelled to take the title.

Equity discountenances the destruction of contingent remainders(d), yet if they really are barred, a purchaser will be compelled to accept the title. This point, which was formerly doubted, was very fully argued before Lord Eldon(e), who several times expressed a strong opinion upon it in favor of the seller, although ultimately he was not called upon to decide the point; and it has since been decided by Sir John Leach, when Vice-Chancellor(f).

In *Beavor v. Simpson*(g), the Master of the Rolls held, that a solicitor who had been employed by a person to advise on the title to a property, could not on purchasing the same property from his client set up an objection to the title, which he did not think of any importance when advising his principal. His Honor also decided, that although there were two partners, and the purchaser, who was one of them, did not personally interfere with the title or the purchase by his client, and swore by his answer that he had no recollection of the title at the time of his purchase, yet these circumstances did not vary the rule.

Where an abstract begins with a recovery to bar an entail, it is usual in practice to call for the deed creating the entail, in order to see that the estate tail and remainders (*)over, if any, were effectually barred(l). But if the

(c) *Long v. Collier*, 4 Russ. 267.

(d) *Roake v. Kidd*, 5 Ves. jun. 647.

(e) *Kenn v. Corbett*, MS.

(f) *Hasker v. Sutton*, 2 Sim. & Stu. 313.

(g) 1 Tamlyn, 69.

(l) This makes it advisable in deeds for an estate tail to recite so
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deed is lost, and possession has gone with the estates created by the recovery, for a considerable length of time, and the presumption is in favor of the recovery having been duly suffered, the purchaser will be compelled to take the title, although the contents of the deed creating the entail do not actually appear(*h*).

So where an old deed recites prior deeds, and the seller is unable to procure the instruments recited, the true inquiry is, whether the absence of the deeds recited throws any reasonable doubt upon the title. Where there is a title of sufficient age without the aid of the recited deeds, and no circumstance to repel the presumptions in favor of the title, the Court will compel the purchaser to accept it(*i*).

Where a vendor is tenant in tail, with reversion to himself in fee, and the reversion has vested in different persons, a common recovery is generally required by a purchaser; because that *bars* the remainder, while a fine lets it into possession, and thereby subjects the whole fee to any incumbrance which before affected the reversion only. But unless some incumbrance appear, or the title to the reversion is not clearly deduced, the Court will not compel a vendor to suffer a recovery on account of the mere probability of the reversion having been incumbered(*l*).

(*) Thus in a late case(*k*), upon an exception to the Master's report in favor of the title, the objection to

(*h*) *Coussmaker v. Sewell*, Ch. 4th May 1791, MS.; Appendix, No. 14; and see *Nouaille v. Greenwood*, 1 Turn. 26.

(*i*) *Prosser v. Watts*, 6 Madd. 59.

(*k*) *Sperling v. Trevor*, 7 Ves. jun. 497.

much of the instrument under which the tenant in tail claims as will manifest his power of barring the estate tail and remainders over.

(*l*) This is allowed to remain as an illustration of the doctrine, although the law is now altered by the 3 & 4 W. 4, c. 74.

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the title was, that one Elizabeth Baker ought to join in a recovery; the title being derived from John Pain, who, in 1693, limited the estate to the use of himself for life; remainder, subject to a term, to uses which never arose; remainder to his daughters in tail; remainder to himself in fee. Under these limitations, Elizabeth, an only daughter, became seised in tail, with the immediate reversion to her father, who made a will, not executed so as to pass real estate, whereby he devised all his estate to his second wife. Upon his death, Elizabeth his daughter entered, and levied a fine. She had issue a daughter, Elizabeth, who married William Baker. They had issue one daughter, Elizabeth Baker. From her the estate was purchased under a decree, and by mesne purchases became vested in the plaintiff. The defendant, the purchaser, suggested, that the ultimate remainder in fee might have been by deed or will disposed of by John Pain, or by any other person to whom it might have descended; and if the same should have been so disposed of, it could then be barred only by Elizabeth Baker. The Lord Chancellor held a recovery not necessary.

At this day it frequently happens, that in deeds securing debts on real estate, the estate is authorized to be sold without the assent of the owner, in case default is made in payment of the money on the day named. Such a security is so far a mortgage, that the owner may at any time before a sale require a re-conveyance upon paying the money due; and in consequence of the old rule, that once a mortgage always a mortgage, the owner is in these cases usually required to join in the conveyance, (*)which he is mostly unwilling to do; his object being to prevent a sale. But it has been decided by Lord Eldon, that the objection cannot be sustained, and this decision was made in a case where the deed was in form a regular mortgage with a power of sale, and the mortgagor in his

answer stated that he actually resisted the sale as having been made without his consent and at an undervalue(*l*). This has been followed in many later cases, and is now an established rule(*m*).

I. It is clear that a woman is barred of her dower, both at law and in equity, by a legal term created previously to her right of dower attaching on the estate, of which an assignment has been obtained by a purchaser to attend the inheritance(*n*). For although she can recover her dower at law, it will be with a *cesset executio* during the term, and equity will not remove the bar. But notwithstanding that a purchaser could obtain an assignment of an outstanding term, which would bar the vendor's wife of her dower, a fine was always required from the vendor and his wife at his expense. It was, however, decided, that a court of equity would enforce a purchaser to accept the title without a fine(*o*).

The wife of a trustee in fee, or of a mortgagee in fee of a forfeited mortgage, is at law entitled to dower; but a fine is on that account never required by a purchaser; because, if the wife of a trustee or a mortgagee were to (*)be so ill-advised as to prosecute her legal claim, equity would, at this day, undoubtedly saddle her with all the costs(*p*).

(*l*) *Clay v. Sharpe and others*, Ch. Mich. Term. 1802, Lib. Reg. A. 1802, fo. 66, Appendix, No. 15.

(*m*) *Baker v. Dibbin*, *Dibbin v. Baker*, Exch. April 20, 1812, MS.; *Corder v. Morgan*, 18 Ves. 344; *Note*, *Stabback v. Leatt*, Coop. 46, which was taken from a hasty note on a brief, is not, when attentively considered, an authority the other way.

(*n*) *Vide infra*, ch. 9.

(*o*) See 10 Ves. jun. 261, 262; 1 Jac. & Walk. 665; 1 Jac. 490.

(*p*) See *Noel v. Jevon*, *Bevant v. Pope*, 2 Freem. 43, 71. See *Gervoyes's case*, Mo. 717, pl. 1002; and see 4 Co. 3 b; 4 Bro. C. C. 506, n; *Mansfield's case*, Harg. n. 81; Co. Litt. 33, a; *Simpson v. Gutteridge*, 1 Madd. 609.

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It was a point of some nicety, which was in former editions discussed at length in this place, whether where the wife of a vendor had only an equitable jointure, a purchaser could require a fine. But the late statutes(*q*) have rendered it unnecessary to do more than refer to the authorities with a view to cases depending upon the old law.

It is not necessary that a wife should previously to marriage be a party to the deed securing her jointure, but there is no *decision* to prove that a jointure can be made upon a wife before marriage without the privity of herself, or if under age of her guardian, which will bind her(*r*). There have been different opinions upon this question; but if a wife could be barred without her privity, a man might in every case secretly bar his wife of dower by a mere nominal jointure. The statute does not authorize such a fraud; and it would lead to great inconvenience to refer it to a jury to inquire whether a jointure made without the wife's privity was fraudulent or not. The power which the statute reserves to a woman to elect her dower where a jointure is made after marriage, unless by act of parliament, appears to proceed on the ground that she is during the coverture incapable of consenting to the jointure without the aid of parliament; and seems to prove that the legislature could not intend to bind her by a jointure made without her privity, when she was competent(*)to consent. If her consent was not necessary, it would be unimportant whether the jointure was made by her husband before or after marriage. At the common law, a jointure before marriage was not a bar of dower for two reasons: 1. Because the woman had no title of dower at the time of the acceptance of the satisfaction;

(*q*) 3 & 4 W. 4, c. 74; 3 & 4 W. 4, c. 105.

(*r*) In *Jordan v. Savage*, 2 Eq. Ca. Abr. 101, the widow took possession of the lands limited to her for her jointure by the articles; see 2 Eden. 66.

2. Because no collateral satisfaction can bar any right or title of any inheritance or freehold. Coke explains the origin of jointures thus: Before the making of the statute of uses, the greatest part of the land in England was conveyed to uses, and as a wife was not dowable of uses, *her father or friends upon her marriage procured* the husband to take an estate from his feoffees, or others seised to his use, to him and to his wife before or after marriage for their lives or in tail, *for a competent provision for the wife* after the husband's death. Then came the statute of uses, by the operation of which, if further provision had not been made, the wives would have as well their dowers as their jointures, and for this reason the branches concerning jointures were added to the statute(s). In a passage where Coke says, that if a jointure is made to a woman before marriage the wife cannot wave it, he refers to an authority in which the jointure was made in performance of covenants(t). It is evident that Coke considered that her assent was requisite to a jointure made before marriage. Gilbert was of the same opinion. In his Uses(u), he says, if a jointure be made before marriage, she is sole, *and as such under no man's power*; if after marriage she take a jointure in satisfaction of a dower, she may wave it after coverture. But whatever may be the law on this point, no jointure is ever made without the wife's privity. No case has occurred since the statute of Henry 8. of a jointure made without the wife's privity, (*)and not afterwards accepted by her. Of course, therefore, no distinction ever existed in practice between such cases, and cases where the wife being adult consented to the provision. The provision in each case, that is, whether made with or without her consent, equally proceeds from the husband, and is equally supported by the same consideration; viz. marriage. If the jointure, made with

(s) 4 Rep. 1 b, 2 a.

(t) Ib. 3.

(u) Page 152.

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the wife's privity before marriage, does not preclude her from claiming dower out of her husband's other estates, if she be evicted from her jointure, under the provision in the statute, of course the same rule must prevail in equity. Clearly, equity could not, on the ground of implied contract, or of the wife's right to investigate the title to the jointure lands, restrain her from claiming her dower out of her husband's other estates. No such equity has ever been administered. It is admitted, that jointures made with the wife's privity are only a bar by force of the statute, but the bar does not extend to the excepted case of an eviction of the dower; and to raise a case of equity against a woman claiming the benefit of the exception, it would be necessary to prove an express contract by her relinquishing such benefit. •

The Author, in the last edition, stated his impression to be, that where an estate would be subject to the dower of the vendor's wife, if she were not barred by a jointure, whether legal or equitable, the vendor must either procure his wife to levy a fine of the estate at his own expense, or must produce a satisfactory title to the jointure lands. And this was no more than is constantly required where an estate has been taken in exchange. The vendor is compelled to produce the title not only to the estate sold, but also to the estate given by him in exchange. The same principle applied to the case under consideration.

(*)But this, like the former point, is only material with reference to cases *not* within the late Act, to which reference will shortly be made. A fine cannot now be levied.

II. Equity appears to consider any provision, however inadequate or precarious it may be, which an adult previously to marriage accepts in lieu of dower, a good

equitable jointure(*x*)(213): and will in some cases even *imply* an intention to bar the wife of her dower; thus, where a provision was made for the livelihood and maintenance of the wife after her husband's death, although it was not expressed to be in bar of dower, yet it was holden to be a bar in equity, on the implied intention of the parties(*y*)(214).

But in a case where a leasehold estate was settled before marriage upon the intended wife "in recompense,

(*x*) *Jordan v. Savage*, Bac. Abr. Jointure, (B) 5; *Charles v. Andrews*, 9 Mod. 152; *Williams v. Chitty*, 3 Ves. jun. 545; 4 Bro. C. C. 513. This was admitted by the counsel for the appellants in *Drury v. Drury*. See 5 Bro. P. C. 581.

(*y*) *Vizard v. Longdale*, 3 Atk. 8, cited; reported 2 Kel. Cha. Ca. 17, nom. *Vizod v. Londen*. See 2 Com. Dig. 148; *Estcourt v. Estcourt*, 1 Cox, 20. See *Tinny v. Tinny*, 3 Atk. 8; *Couch v. Statton*, 4 Ves. jun. 391; and *Garthshore v. Charlie*, 10 Ves. jun. 20. See Sugd. n. (7) to Gilb. on Uses, p. 332.

(213) See *Hastings v. Dickinson*, 7 Mass. Rep. 153. *Ambler v. Norton*, 4 Hen. & Munf. 23.

In *Hastings v. Dickinson*, it was held, that where the wife covenanted in a marriage settlement not to demand dower in the husband's estate in consideration of an annuity, which was to be paid out of his estate, this was no bar of dower. At common law a jointure made to a wife, before or after marriage, was no bar to her dower; because the dower being a freehold could not be barred by any collateral satisfaction. And no jointure is a bar within the statute of 27 Hen. 8. c. 10, unless it be a freehold in lands, tenements or hereditaments, for the life of the wife at least, and which shall take effect in possession or profit immediately on the husband's death. The covenant cannot have the effect of a release of dower; for a release of a future demand, not then in existence, is void. On this principle, if there be any relief against the widow on her covenant, it must be by action.

(214) See *Van Orden v. Van Orden*, 10 Johns. Rep. 30. *Adsit v. Adsit*, 2 Johns. Ch. Rep. 448. See also, *Smith v. Kniskern*, 4 Johns. Ch. Rep. 9. *Swaine v. Perine*, 5 Johns. Ch. Rep. 482. *Webb v. Evans*, 565, 572. *Kennedy v. Nedrow*, 1 Dall. 415. *Creacraft v. Wions*, Addis. 350. *Herbert v. Wren*, 7 Cranch, 370. *Ward v. Wilson*, 1 Des. 401, 409. *Snelgrove v. Snelgrove*, 4 Des. 274, 293.

and bar of dower, and for a provision for her," and the husband had no real estate, it was held that the wife's right to thirds was not barred(*z*). For, as the declared object was to bar her of dower, no implication could be admitted, that she was to be barred of thirds also; the direction that the settlement was for a provision for her, only expressed the effect of the settlement, and could not be deemed evidence of an intention to bar her of a right which was not named.

(*) So, as infants are within the statute of Henry 8.(*a*), and may be barred of dower at law, they may in like manner be barred by an equitable jointure(*b*).

But an equitable provision in bar of dower will not bind an infant, unless it be as certain a provision as her dower. Therefore a settlement of an estate upon an infant for life, after the death of her husband *and any third person*, will not be a good bar, as the stranger may survive the wife(*c*). So a provision that the personal estate shall go according to the custom of London, in bar of dower, or any provision of that nature, will not be deemed an equitable bar of dower to an infant, on account of the uncertainty and precariousness of the provision(*d*).

Supposing an equitable jointure to be merely charged on stock vested in trustees, *and the wife to have been married under age*, there seems reason to contend, that *if the fund should be wasted by the trustees*, equity would not restrain the wife from proceeding for her dower; and in

(*z*) *Cresswell v. Byron*, 3 Bro. C. C. 362. See *Pickering v. Lord Stamford*, 3 Ves. jun. 332.

(*a*) *Drury v. Drury*, or, *Earl of Bucks v. Drury*, 5 Bro. P. C. 570; 4 Bro. C. C. 506, n.; *Wilmot*, 177.

(*b*) See the cases, *ante* n. (*t*).

(*c*) *Caruthers v. Caruthers*, 4 Bro. C. C. 500. See *Corbet v. Corbet*, 1 Sim. & Stu. 612, which was affirmed by the Lord Chancellor upon appeal.

(*d*) *Smith v. Smith*, 5 Ves. jun. 189; 5 Russ. 254.

that case a purchaser would certainly have been entitled to a fine(I).

In *Caruthers v. Caruthers*(e), Lord Alvanley, then Master of the Rolls, addressing himself to what was and what was not an equitable bar of dower to an infant, put the case of a charge in bar of dower made upon an estate with a bad title, and held that it would be no bar. Therefore, whatever opinion may be entertained on the general question, a purchaser must be satisfied of the title (*)to the lands upon which the equitable jointure of a *feme covert* married under age is charged. And where the settlement rests in covenant, the purchaser should not complete his contract until the covenant be actually performed; for an alienation by the husband of the fund out of which the jointure is to arise, will be deemed an eviction of the fund, and consequently the wife will be let in for her dower(f).

III. The foregoing observations apply to the law as it stood before the 3 & 4 Wil. 4, c. 105. That Act is *not* to extend to the dower of any widow who shall have been or shall be married on or before the 1st January 1834, and is not to give to any will, deed, contract, engagement or charge executed, entered into, or created before that day, the effect of defeating or prejudicing any right to dower(g). It is, therefore, still necessary to know what the law was with reference to the cases to which the Act does not extend. And it must be borne in

(e) 4 Bro. C. C. 500. See 5 Ves. jun. 192.

(f) *Drury v. Drury*, 4 Bro. C. C. 506, n.

(g) Sec. 14. The 3 & 4 W. 4, c. 74, s. 77, may be held to extend to dower, so as to enable a married woman to destroy it, but it does not in expression accurately embrace it.

(I) This point does not appear to be decided either by *Drury v. Drury*, or *Williams v. Chitty*.

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mind that as to widows within the exception, their rights are saved in estates acquired by their husbands, even after the 1st January 1834.

The right of dower of women married after the 1st January 1834, is placed on altogether a different footing. It is enacted, that when a husband shall die, beneficially entitled to any land(I) for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal (*)and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession, (other than an estate in jointenancy,) then his widow shall be entitled in equity to dower out of the same land(h), so that now dower attaches on equitable estates.

And when a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same although her husband shall not have recovered possession thereof; provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced(i).

1. The above are both provisions extending the wife's right to dower; but the other provisions place the right altogether in the power of the husband. For no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will(k).

(h) Sec. 2.

(i) Sec. 3.

(k) Sec. 4.

(I) The word "land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal (except such as are not liable to dower), and to any share thereof; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; sect. 1.

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2. All partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower^(l).

3. And a widow shall not be entitled to dower out of any land of her husband when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land^(m).

4. And a widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate when by the will of her husband, duly ^(*)executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land⁽ⁿ⁾.

5. And the right of a widow to dower shall be subject to any conditions, restrictions, or directions which shall be declared by the will of her husband, duly executed as aforesaid^(o).

There appears to have been no sufficient ground for this alteration of the law. The wife's ancient right of dower has been in effect taken away. And surely it is inconsistent, whilst you enable the husband in every case to defeat it, to extend the right over equitable estates. The first clause of the provision, No. 3, was suggested by the Author, and was, by the desire of Lord Eldon, introduced into a bill for altering the statute of limitations, brought into the House of Commons by the present Vice-Chancellor, when he was a member of that House. It was no infringement upon the right of the wife, for as the husband might have limited the estate to uses to bar dower, so as to prevent dower from attaching, there was no reason why his

(l) Sec. 5.

(n) Sec. 7.

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(m) Sec. 6.

(o) Sec. 8.

simple declaration should not have the same operation ; and the object was to prevent the unnecessary creation of powers. . But the vesting of a power in the husband to defeat the wife's right after it has attached must be defended upon different grounds.

The Act then proceeds to provide for the cases in which testamentary provisions by the husband for his wife shall be a bar of her dower.

1. Where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, (*)unless a contrary intention shall be declared by his will(*p*).

2. But no gift or bequest made by any husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will(*q*).

And it is provided that nothing in the Act contained shall prevent any court of equity from enforcing any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out of his lands(*r*). Nor is any thing in the Act to interfere with any rule of equity, or of any ecclesiastical court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies(*s*).

Lastly, dower *ad ostium ecclesiæ*, and dower *ex assensu patris*, are abolished(*t*).

In the case of *Pope v. Simpson*(*u*), Lord Rosslyn ap-

(*p*) Sec. 9.

(*r*) Sec. 11.

(*t*) Sec. 13.

(*q*) Sec. 10.

(*s*) Sec. 12.

(*u*) 5 Ves. jun. 145.

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pears to have held, that persons purchasing from the assignees of a bankrupt have no right to expect more, than that the assignees should deliver over such title as the bankrupt had. This decision, however, was opposed by prior cases(*x*), and the general rules of equity; and in a late case Lord Eldon expressly denied the doctrine advanced by Lord Rosslyn(*y*); and Sir William Grant actually decided, that assignees stand in the situation of ordinary vendors(*z*).

(*) But in a case(*a*) where assignees, having a defective title, put it up to sale, and one of the conditions stated, that the purchaser should have an assignment of the bankrupt's interest to one moiety of the estate, *under such title as he lately held the same*, an abstract of which might be seen at a place named in the conditions, the Vice-Chancellor stated, that a vendor, if he thinks fit, may stipulate for the sale of an estate with such title only as he happens to have; and he held, that in this case the assignees sold only such title as they had; but as it was stated that the conditions of sale were not circulated before the sale, the purchaser was offered an inquiry as to this fact.

Conditions like that in *Freme v. Wright* should be looked at with great jealousy, as they are often traps for the unwary; and the Court should at least expect the fact to be broadly stated, that the seller only sells such title as he has, without warranting the same.

In *Dick v. Donald*, in the House of Lords, where the articles of roup in Scotland bound the seller to execute and deliver a valid irredeemable disposition of the pro-

(*x*) *Spurrier v. Hancock*, 4 Ves. jun. 667; and see *Orlebar v. Fletcher*, 1 P. Wms. 737.

(*y*) *White v. Foljambe*, 11 Ves. jun. 337; and see 18 Ves. 512.

(*z*) *M'Donald v. Hanson*, 12 Ves. jun. 277.

(*a*) *Freme v. Wright*, 4 Madd. 364. See *Baxter v. Conolly*, 1 Jac. & Walk. 576; *Wilmot v. Wilkinson*, 6 Barn. & Cress. 506.

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perty, and to deliver to the purchaser certain specified instruments, "which are all the title-deeds of the property in his, the seller's custody," and it was insisted that the title was limited by the articles of roup, it was decided otherwise; and Lord Eldon said, that he could see nothing in the article of roup to take away the right to a good title. As to the condition with respect to the title-deeds, he never heard that because the seller provides, by the condition, that he will give to the purchaser only certain specified deeds, the purchaser must take a bad title, or such title as appears upon the deeds(b).

(*)In *Clarke v. Faux(c)*, an estate was sold by assignees of a bankrupt, and a good title was to be made. One of the assignees purchased and took possession. He agreed to sell to the plaintiff, who entered into possession, and paid part of his purchase-money. A dispute was terminated by an agreement that the plaintiff should pay the residue of the purchase-money on a day named, together with interest, upon the seller to him making a good title to the premises, or otherwise, if such title should not then be completed, upon the seller executing at his own expense a bond to complete such title, and to convey the estate as soon as the same could be completed. A good title could not be made by the seller to the plaintiff, who recovered the residue of the purchase-money at law, and having tendered a bond conditioned for making a good title to the purchaser, he insisted, in answer to the plaintiff's bill, that the plaintiff was bound to take the property with the bond, whether a good title could be made or not. But it was held that the meaning of the parties was, that the money was to be paid on the day named, although the title might not then be completed; but subject always to this condition, that the vendor had the power to com-

(b) 1 Bligh, N. S. 655.

(c) 3 Russ. 320.

plete it, and that it was not intended that it should be paid if the vendor did not possess such power.

Formerly, where a vendor claimed under a modern will, by which the heir at law was disinherited, it was usual to require the will to be proved in equity against the heir at law^(d): but this practice is now almost wholly discontinued. In the case of *Colton v. Wilson*^(e), the purchaser was in the first instance discharge from his purchase on account of the will not being proved against the heir at law^(*); but on a re-hearing he was compelled to take the title. This decree, however, was made on the particular circumstances of the case, and the point was by no means settled. In *Bellamy v. Liversidge*^(f), the title received the Master's approbation, although the will was not proved against the heir at law; and upon exceptions to his report on that account coming on, Lord Kenyon, then Master of the Rolls, overruled them.

It is not unusual to require the heir at law to join in the conveyance, if his concurrence can be easily obtained; and where he is a party to a conveyance in any other character, he is invariably made a conveying party, in his character of heir at law; although in strictness this could not be insisted upon.

If it should even be thought that a modern will must be proved against the heir at law, yet it seems clear that equity would not compel the vendor, at the suit of the purchaser, to prove the will *per testes*. The objection, therefore, under any construction, could only be set up by a purchaser, as a *defence* to a specific performance.

^(d) See *Fearne's Posthuma*, 234. See *Harrison v. Coppard*, 2 Cox, 318, as to the custody of the will.

^(e) 3 P. Wms. 190.

^(f) Chan. 12 June 1786, MS.; and see *Wakeman v. Duchess of Rutland*, 3 Ves. jun. 233; 8 Bro. P. C. 145; and *Morrison v. Arnold*, 19 Ves. jun. 673; *sed vide* *Smith v. Hibbard*, 2 Dick. 730.

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Where a will has been executed it must be produced before a purchaser can be compelled to accept the title, although having been treated as a nullity by a professional man it has been mislaid, and the seller, being heir of the testator, has rested upon his title as heir(*g*).

As the law of descent has lately been greatly altered, we may, perhaps, in this place, usefully introduce the Act(*h*) by which the alteration was effected.

(*)The statute enacts, 1. That in every case descent(*l*)

(*g*) *Stevens v. Guppy*, 2 Sim. & Stu. 439.

(*h*) 3 & 4 W. 4, c. 106.

(*l*) The word "land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal, and whether freehold or copyhold, or of any other tenure, and whether descendible according to the common law, or according to the custom of gavelkind or borough-english, or any other custom, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right, or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles, and interests, or any of them, shall be in possession, reversion, remainder, or contingency; and the words "the purchaser" shall mean the person who last acquired the land otherwise than by descent, or than by any escheat, partition, or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent; and the word "descent" shall mean the title to inherit land by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation, as where he shall be a child or other issue; and the expression "descendants" of any ancestor shall extend to all persons who must trace their descent through such ancestor; and the expression "the person last entitled to land" shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof; and the word "assurance" shall mean any deed or instrument (other than a will) by which any land shall be conveyed or transferred at law or in equity; and every

(*371)

shall be traced *from the purchaser*; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purposes of this Act, be considered to have been the purchaser thereof *unless it shall be proved that he inherited the same*, in which case the person from whom he inherited the same shall be considered to have been the purchaser *unless it shall be proved that he inherited (*)the same*; and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser, *unless it shall be proved that he inherited the same(i)*.

2. And when any land shall have been devised, by any testator who shall die after the 31st day of December 1833, to the heir or to the person who shall be the ~~heir~~ of such testator, such heir shall be considered to have acquired the land *as a devisee, and not by descent*; and when any land shall have been limited, by any assurance executed after the said 31st day of December 1833, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same *as a purchaser* by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof(k).

3. And when any person shall have acquired any land *by purchase* under a limitation to the heirs or to the heirs of the body of any of his ancestors, contained in an

(i) Sec. 2.

(k) Sec. 3.

word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male. Sect. 1.

(*372)

assurance executed after the said 31st day of December 1833, or under a limitation to the heirs or to the heirs of the body of any of his ancestors, or under a limitation having the same effect, contained in a will of any testator who shall depart this life after the said 31st day of December 1833, then and in any of such cases *such land shall descend*, and the descent thereof shall be traced as *if the ancestor named in such limitation had been the purchaser of such land*(*l*).

4. No brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent(*m*).

(*)5. And every *lineal ancestor* shall be capable of being heir to any of his issue ; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so *that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue*, other than a nearer lineal ancestor or his issue(*n*).

6. And none of the *maternal ancestors* of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed ; and also that no *female paternal ancestor* of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed ; and that no *female maternal ancestor* of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed(*o*).

(*l*) Sec. 4.

(*n*) Sec. 6.

(*m*) Sec. 5.

(*o*) Sec. 7.

(*373)

7. And where there shall be a failure of *male paternal ancestors* of the person from whom the descent is to be traced, and their descendants, *the mother of his more remote male paternal ancestor*, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of *male maternal ancestors* of such person, and their descendants, *the mother of his more remote male maternal ancestor*, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor, and her descendants(*p*).

(*)8. And any person related to the person from whom the descent is to be traced by the *half blood* shall be capable of being his heir; and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be *next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male; and next after the common ancestor where such common ancestor shall be a female*, so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother(*q*).

9. And when the person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, shall have died *before such descent shall have taken place*, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same, by tracing his descent through such relation, if he had not been attainted, unless such land shall have escheated in conse-

(*p*) Sec. 8.

(*q*) Sec. 9.

(*374)

quence of such attainder before the 1st day of January 1834(*r*).

10. But the Act does not extend to any descent which shall take place on the death of any person who shall die before the said 1st day of January 1834(*s*).

And where any assurance executed before the said 1st day of January 1834, or the will of any person who shall die before the same 1st day of January 1834, shall contain any limitation or gift to the heir or heirs of any person, under which the person or persons answering the description of heir shall be entitled to an estate by purchase, then the person or persons who would have (*)answered such description of heir, if this Act had not been made, shall become entitled by virtue of such limitation or gift, whether the person named as ancestor shall or shall not be living on or after the said 1st day of January 1834(*t*).

IV. There is a serious objection frequently taken to titles, which it may not be improper to consider in this place.

The objection to which I allude is, that an equitable recovery is void where the *equitable* tenant to the *præcipe* has the legal estate. In support of this objection, it is urged, that where the legal freehold is limited to one for life, with an equitable remainder to the heirs of his body, the estates cannot coalesce so as to make the parent tenant in tail, notwithstanding that he has the beneficial, and consequently the equitable estate for life ; and therefore, upon the same principle, the legal tenant for life cannot be considered as seised of an equitable estate, distinct from his legal estate, so as to support the recovery as a good equitable recovery.

In answer to this argument, it may be said, that the

(*r*) Sec. 10.

(*s*) Sec. 11.

(*t*) Sec. 12.

(*375)

reason why the equitable remainder to the heirs of the body cannot coalesce with the legal estate for life is, that the rule in Shelly's case requires both estates to be legal. This is an imperative rule of law, which courts of equity can no more depart from than they can alter the rules of descent. Equity, however, follows the law ; and, therefore, if both estates are equitable, they will unite in the same manner as if they were legal estates. But as Mr. Fearne, with his usual ability, observes, when both the estates are *not legal*, the application of a *legal construction*, or operation of a *rule of law*, which must equally affect *both*, (*) seems to be excluded by one of the objects of that construction not being a subject of *legal cognizance*. So when both are *not equitable* estates, their combination seems to be out of the reach of an *equitable construction* to which one of the estates is not adapted(*u*).

Now this difficulty does not occur in the principal case. The equitable estate tail has no existence in contemplation of law, but depends wholly on the rules of equity for its support. And therefore there is no rule of law which says that the recovery shall be void. Equity, with respect to equitable recoveries, adheres as nearly as may be to the mode of barring entails prescribed by the law. In this instance the analogy is strictly preserved, for the tenant to the *præcipe* has the equitable estate of freehold. And if a court of equity were to hold a recovery bad, on the ground of the equitable tenant to the *præcipe* having the legal estate, it would only make another deed necessary. The tenant for life would convey to a third person in trust for himself, before he made a tenant to the *præcipe*, and by this simple expedient vanquish the objection.

In a manuscript opinion, given by Mr. Fearne, on this point, in which he held the recovery to be good, although the equitable tenant to the *præcipe* had the legal estate,

(*u*) Cont. Remainders, p. 78, 5th edit.

(*376)

he first adverts to the analogy preserved between legal and equitable recoveries, and then proceeds thus: "The principle applies with no less force, where we suppose the tenant for life to be of the *legal estate*, for his *own benefit*. For then the *equitable interest* is involved in the *legal*; and of consequence all that is required by the said rule of analogy is had in *his concurrence*, viz. the concurrence of the person entitled to the *beneficial interest or permanency of the profits* of the immediate estate of freehold. If the concurrence of a person entitled to the mere beneficial (*) interest of freehold will answer the rule of analogy to the requisite extent for barring *equitable estates tail and remainders*, can there be a doubt in regard to the competency of the person entitled *not merely to that degree of interest*, but to a *comprehending greater estate*, adequate even to the purpose of *barring legal estates and remainders*? The analogy supposes that a recovery by an equitable tenant in tail will bar the equitable estate tail and remainders, and reversion, even where, if the estate tail and remainders had been *legal*, such recovery *would not have barred them* for want of a legal tenant to the *præcipe*; because that analogy in the one case *substitutes an equitable tenant* in the place of a *legal one* in the other. Now, can the same rule of analogy ever deny to a recovery by a tenant in tail of an *equitable estate* the same effect in barring his estate tail and the subsequent equitable remainders and reversion, as it *would have had* if all those estates *had been legal*? Such a doctrine would be out-running the analogy, and the very ground for its adoption, in disabling those very persons from barring equitable estates tail and remainders, who might have barred them if they had been *legal* instead of *equitable*. This would scarcely be reconcilable with the well-known maxim of *æquitas sequitur legem*.

If the objection cannot be supported upon principle, much less can it be sustained upon authority. On the

one hand, it has never been said that such a recovery is void, except in the case of *Shapland v. Smith*(*x*), where Lord Thurlow is made to say, that Christopher had only an equitable estate for life, and the subsequent estate being executed, he had an equitable estate for life, *and a legal remainder in tail*, which could not unite; and of course there could not be a good tenant to the *præcipe*, (*)and the recovery suffered was void; it being necessary, in order to make a good tenant to the *præcipe*, that there should be a legal estate for life, with a *legal reversion in tail*, or an equitable estate for life, with an equitable reversion in tail. Upon the latter *dictum*, Mr. Fearne, in the opinion before referred to, observes, that he could not hesitate in imputing it to the same inaccuracy or misapprehension of the reporter to which other unwarrantable positions in the same case must, as he conceived, be ascribed. That case came before the Court in consequence of his opinion, taken by the intended purchaser, in which he had objected to the title on the ground of Shapland's taking only an *equitable estate* for life, and the limitation to the heirs of his body operating as a *contingent legal remainder* to such heirs; the equitable and legal estates being incapable of *that union* which was requisite to vest the *latter at all in him*, or give him an *estate-tail of any kind*. Baron Eyre inclined against the objection; but on a re-hearing Lord Thurlow admitted it, and the insufficiency of the recovery depended, as he (Mr. F.) understood, not on the want of a *good tenant to the præcipe*, but the want of *an estate tail in Shapland*. And the report accordingly in the margin states, that it was *not an estate tail* in C. S. though the report itself makes the Chancellor speak of it as a *legal remainder in tail in him*. Mr. Fearne concludes by saying, that "therefore he could lay no sort of stress on any vague

(*x*) 1 Bro. C. C. 78.

(*378)

expressions in *such a report*.” And indeed it seems clear, that the ground of Lord Thurlow’s judgment was, the impossibility of the estates uniting, the one being equitable, and the other legal; and that his observations on legal and equitable recoveries are mis-stated in the report. A slight emendation will make the sentence, which refers to this doctrine, correct. It may be read thus: “It being necessary, in order to make a good tenant to the *præcipe*, (*)that there should be a legal estate for life, *where there is* [instead of with] a legal reversion in tail; or an equitable estate for life, *where there is* [instead of with] an equitable reversion in tail.” And this sentence, as corrected, by no means implies that a legal tenant for life, for his own benefit, has not an equitable estate for life, sufficient to support an equitable recovery.

If then we remove this *dictum* of Lord Thurlow, as it stands in the report, there is no *authority* in the books in support of the objection. But, on the other hand, we have Lord Alvanley’s authority, that where the equitable tenant for life has also the legal estate for life, that is no objection to the recovery. And this observation was not lightly made, for his Lordship repeated it in the course of his judgment(y). And indeed the very point appears to have been decided in the 16th year of Charles 2d, in a case where a man was legal tenant for life by conveyance; and afterwards the reversioner and ancestor covenanted, in consideration of blood, to settle the estate on him in tail; so that in equity he had a trust in tail in the estate. And the Court confirmed a recovery suffered by him, although at the time of suffering it he was but tenant for life in law; *and this although it was objected that he ought first to have exhibited his bill, and have had his estate decreed to him in tail according to the articles(z).*

(y) Phillips v. Bridges, 3 Ves. jun. 126, 128.

(z) Goodrick v. Brown, 2 Freem. 180; 1 Cha. Ca. 49.

But, even admitting this objection, it cannot be extended to a case where the equitable tenant for life, who makes the tenant to the *præcipe*, is legal tenant *in fee*. The estates are perfectly distinct. He is not legal and equitable tenant for life, but tenant in fee of the legal estate, and tenant for life of the equitable interest(a).

(*) This point is still important with reference to recoveries already suffered, and therefore the discussion may with propriety retain its place in this treatise. But the whole law as to barring estates tail is by a late statute(b) altered. Fines and recoveries are abolished, and a new mode of unfettering estates in settlement is introduced. As this law will have great influence upon titles, and it must be some time before its provisions can be generally circulated, it may not be improper to introduce them in this place.

By the Act referred to, fines and recoveries are abolished after the 31st December 1833; and(c) persons bound after that day by agreement to levy a fine or suffer a recovery, are enabled to perform their contract without actually levying the one or suffering the other. The Act then gives validity to recoveries, although the bargain and sale to make the tenant to the *præcipe* was not enrolled in due time(d): and no recovery(e) is to be invalid in consequence of any person having a legal estate not having joined in making the tenant to the *præcipe*, provided the tenant shall have been made by a person who had an estate in possession not less than for a life, in the rents or surplus after payment of charges thereon, and whether there be any actual surplus or not; and an estate is to be deemed to be in possession notwithstanding any prior leases for lives or years at a rent, or any

(a) *Marwood v. Turner*, 3 P. Wms. 171.

(b) 3 & 4 W. 4, c. 74.

(c) Sec. 3.

(d) Sec. 10.

(e) Sec. 11.

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term of years without rent. But this is confined by certain exceptions in the Act(*f*). The object of these excellent provisions is to render valid recoveries already suffered.

The Act then avoids(*g*) all warranties by tenant in tail against the issue in tail and persons in remainder.

(*)The Act then(*h*) provides, that after the 31st December 1833, every actual tenant in tail, whether in possession, remainder, contingency or otherwise, shall have power to dispose of for an estate in fee-simple absolute, or for any less estate, the lands entailed, saving the rights of persons in respect of estates prior to the estate tail. But women who are seised in tail under existing settlements *ex provisione viri* are prevented from exercising such power of disposition without the assent now required by law; but as to future settlements, the Act of 11 H. 7, c. 20, is repealed. But the power of disposition(*i*) is prevented from extending to tenants in tail within the 34 & 35 H. 8, or who by any other Act are restrained from barring their estates tail, or to tenants in tail after possibility of issue extinct.

In like manner(*k*) after the 31st December 1833, power is given to the persons who would have been tenants in tail if the entail had not been barred and converted into a base fee, to dispose of the lands so as to enlarge the base fee into a fee-simple absolute, but not to affect prior estates. But(*l*) the Act is not to enable any issue, in respect of his hope of succession, to dispose of the entailed property.

The Act then(*m*) makes a disposition by a tenant in tail, by way of mortgage or for any other limited purpose, an absolute bar in equity and law to the extent of

(*f*) Sec. 12.

(*g*) Sec. 14.

(*h*) Sec. 15.

(*i*) Sec. 18.

(*k*) Sec. 19; and see sec. 39.

(*l*) Sec. 20.

(*m*) Sec. 21.

the estate created, against all persons who under the Act can be barred, notwithstanding any intention to the contrary may be expressed or implied in the deed. But notwithstanding any intention, where only an estate *pour auter vie*, or for years, or an interest, charge, lien or incumbrance without a term of years, or any greater estate (*) shall be created, the same shall in equity be a bar only so far as may be necessary to give full effect to the mortgage or charge.

As the old tenant to the *præcipe* could not be reserved under the new plan, the Act proceeds to create a *Protector* of every settlement, whose concurrence in barring estates tail in remainder is required, in order to preserve, under certain modifications, the control of the tenant for life over the remainder-men.

With this view, it is enacted(*n*), that if at the time when there shall be a tenant in tail under a settlement, there shall be under *the same settlement* any estate for years determinable on a life, or any greater estate (not being an estate for years) prior to the estate tail, then the owner of the prior or first estate, or who would have been so if no absolute disposition thereof had been made, shall be the protector of the settlement, and shall, for the purposes of the Act, be deemed the owner of such prior estate, although the same may have been charged or incumbered, and although all the rents be exhausted or required for the payment of the incumbrances on such prior estate, and although such prior estate may have been absolutely disposed of by the owner, or by his bankruptcy or insolvency, or by any other act or default of such owner. An estate by the curtesy in respect of the estate tail, or of any prior estate created by the same settlement, is to be deemed a prior estate, and a resulting use or trust to or for the settlor is to be deemed an estate under the same settlement.

(*n*) Sec. 22.

(*382)

Provisions are then made(*o*) for making each owner of an undivided share the protector of such share, and(*p*) for making the husband and wife the protector in respect of her prior estate, unless her estate shall by the settlement (*) have been settled or agreed to be settled to her separate use, in which case she alone is to be the protector; but it is provided(*q*), that a lease at a rent created or confirmed by a settlement shall not make the owner of it the protector, nor(*r*) shall any woman in respect of her dower, nor any bare trustee, heir, executor, administrator, or assign, be the protector, but in such cases(*s*) the person who if such estate did not exist would be the protector shall be such.

But where before the 31st December 1833, an estate under settlement shall have been disposed of, either for valuable consideration or not, the person who in respect of such estate would, if the Act had not been passed, have been the proper person to make the tenant to the *præcipe*, shall, during the continuance of such estate, be the protector of such settlement; and the Act provides(*t*) for the case of a disposition of a remainder or reversion in fee on or before the 31st December 1833, and preserves to a bare trustee under any existing settlement, who would have been the proper person to make the tenant to the *præcipe*, the right as the protector of such settlement(*u*).

Power is given(*x*), under certain restrictions, to every settlor to appoint protectors of his settlement; and the Act substitutes(*y*) the Lord Chancellor in the place of a protector who shall be a lunatic, and the Court of Chan-

(*o*) Sec. 23.

(*q*) Sec. 26; and see sec. 25.

(*s*) Sec. 28.

(*u*) Sec. 31.

(*y*) Sec. 33, & sec. 48, 49.

(*p*) Sec. 24.

(*r*) Sec. 27.

(*t*) Sec. 30.

(*x*) Sec. 32.

cery in the place of a protector who shall be convicted of treason or felony, or of a protector, not being the owner of a prior estate, who shall be an infant, or where it shall be uncertain whether such last-mentioned person be living or dead. The Court of Chancery is also substituted (*) where the settlor declares that the person who as owner of a prior estate under such settlement, would be entitled to the protector shall not be such protector, and does not appoint any protector in his stead. And also in every other case where there shall be, under a settlement, a prior estate sufficient to qualify a protector, and there shall happen to be no protector, the Court of Chancery is to be the protector.

Having thus provided who shall be the protector, the Act then proceeds to declare in what cases his concurrence shall be necessary.

No actual tenant in tail(z), not having the remainder or reversion in fee immediately expectant on his estate tail, under a settlement where there is a protector, can dispose of the estate to the full extent authorized by the Act, without the consent of the protector, but he may without such consent dispose of the estate against all persons who by force of any estate tail which shall be vested in or might be or have been claimed by him, shall claim the lands. And(a) although the estate be converted into a base fee, yet as long as there is a protector of the settlement, his consent is requisite to the power of disposition given by the Act.

The power of the protector to consent is made absolute; his discretion is absolute and uncontrollable even by a court of equity. Nor can his giving his consent be deemed a breach of trust(b). Nor are the rules of equity in relation to dealings and transactions between a donee of a

(z) Sec. 34.

(a) Sec. 35.

(b) Sec. 36.

(*384)

power and any object of the power in whose favor the same may be exercised, to apply to this case(c).

If a base fee and the remainder or reversion in fee be united in the same person, and there shall be no intermediate (*)estate between them, the base fee shall be *ipso facto* enlarged into as large an estate as the tenant in tail, with the consent of the protector, might have created under the Act, if such remainder or reversion had been vested in any other person(d).

The Act then proceeds to provide by what conveyances a tenant in tail shall convey. Every disposition is to be effected by some one of the assurances (not being a will) by which such tenant in tail could have made the disposition of his estate if a fee-simple absolute ; but it must be made or evidenced by deed. No disposition by a tenant in tail, resting only in contract either express or implied or otherwise, and whether supported by a valuable or meritorious consideration or not, shall be of any force, notwithstanding such disposition shall be made by deed. And the concurrence of the husband of every married woman being a tenant in tail, is made necessary(e).

The protector is authorized to give his consent by the same assurance which effects the disposition, or by a separate instrument. If given by a separate instrument, it is to be deemed an unqualified consent, unless the particular assurance is referred to, and his consent confined to that disposition. After having given his consent, he cannot revoke it(f). A married woman being a protector, either alone or jointly with her husband, may consent as a *feme sole*.

The dispositions and consents are not to operate unless valid in law, for the jurisdiction of equity is altogether excluded(g).

(c) Sec. 37.

(d) Sec. 39.

(e) Sec. 40.

(f) Sec. 42, 43, 44, 45.

(g) Sec. 47.

Copyholds are within the Act, but surrenders are to be made by legal tenants in tail, and surrenders or deeds to be made or executed by equitable tenants in tail(*h*). And the mode in which the protectors are to consent is (*)particularly pointed out(*i*); but it is provided, that every deed by which copyholds are disposed of by an equitable tenant in tail, shall be void against any person claiming such lands for valuable consideration, under any subsequent assurance duly entered on the court rolls, unless the deed by the equitable tenant be entered on the rolls before the subsequent assurance shall have been entered.

The Act then alters the laws as to bankrupt tenants in tail, and gives to the Commissioners a power to alien upon the basis of the provisions in the Act, in favor of solvent tenants in tail(*k*).

And it also repeals the law for relieving persons entitled to entailed estates to be purchased with trust-monies, and applies to the estates to be sold and the monies to be invested (which are treated as if they were the lands to be purchased) the general provisions of the Act(*l*).

The Act then(*m*) contains a provision of great importance. Every married woman not being tenant in tail, is enabled by deed to dispose of lands of any tenure, and money subject to be invested in lands, and also to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right, may have in lands of any tenure, or in any such money; and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure, or in any such money, as effectually as if she were a *feme sole*; but her husband must concur, and the deed

(*h*) Sec. 50 & 53. (*i*) Sec. 51, 52, 53. (*k*) Sec. 55. to sec. 69.

(*l*) Sec. 70, 71. (*m*) Sec. 77.

(*386)

must be acknowledged in the manner required by the Act, and the provision is not to extend to copyholds in cases where the power is not required.

The Act also contains provisions as to lands in ancient (*)demesne, renders amendments of fines and recoveries unnecessary, points out the manner in which deeds, consents and assurances are to be inrolled, and contains certain provisions in favor of purchasers, which latter provisions will be found in their proper place in this work(n).

The sweeping away of fines and recoveries is a solid improvement in the law, and the Act of parliament is a masterly performance, and reflects great credit on the learned conveyancer by whom it was framed. But the policy of the provisions in the Act may be doubted. All men's titles must for many years depend upon the law of fines and recoveries; and few will be found in a short time competent to judge of their validity. The substitute for the old law is one of vast complication, introducing a protector in every settlement to check the alienation by tenant in tail in remainder. Whilst we brush away our old books, no one can doubt that the new system, from its complication, will lay the foundation for new ones, and that the construction of the Act in every given case will not be settled but after a long run of litigation, although no doubt, at first, every thing will proceed smoothly. The Author was one of those who thought that the law would have been more simple if it had merely abolished fines and recoveries, and made deeds to declare the uses of fines, and to make tenants to the *præcipe* in recoveries effectual without actually levying a fine or suffering a recovery.

The Act has effected an important alteration in the law, by making the tenant for life continue to be the protector of a settlement even after he has sold the estate, or it has

(n) *Infra*, ch. 16, s. 7.

passed from him by bankruptcy or insolvency. This appears to be unwise. For the Act takes away the control of equity over the protector ; declares that his discretion (*) is absolute ; that he cannot commit a breach of trust ; and that the doctrines of equity applicable to a donee of a power dealing with an object of the power are not to be applied to him. He may, therefore, make what bargain he pleases with the tenant in tail after the *natural* check (for such the possession of the first estate may fairly be considered) has been conveyed away. In the case of a bankrupt, he may acquire a great property as against his creditors, and a case may occur in which he may by his concurrence enable the first tenant in tail to bar a subsequent remainder vested by his bankruptcy in his own assignees.

V. It so often becomes necessary to consider in what cases an uninterrupted possession creates a title, that the introduction of a few general observations on the operation of the statutes of limitations, may not be deemed impertinent.

1. Then the statutes of limitations operate by way of bar to the *remedy*, and not, like the statutes of fines, as a bar to the *right(o)*. Therefore, although a person is barred of one remedy, yet he may pursue any other remedy which may afterwards accrue to him. Thus, where a tenant in tail discontinued for three lives, and the issue in tail was barred of his formedon by the 21 Jac. 1.(*p*) ; afterwards by the death of the three tenants for life, a right of entry accrued to the issue, who entered, and his entry was held lawful(*q*).

(*o*) See Beckford v. Wade, 17 Ves. jun. 87.

(*p*) Ch. 16. -

(*q*) Hunt v. Bourne, Lutw. 781 ; 2 Salk. 422 ; Com. 124 ; 1 Bro. P. C. 53.

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2. It has frequently been thought that the rights of infants, femmes covert, persons in prison, and beyond sea, are saved by the act of 32 Hen. 8.(*r*) ; but on examination (*)it will appear, that the savings extended only to persons who labored under any of those disabilities *at the time the statute was made*(*s*), (I).

3. The saving clause in the act of James(II) only extends to the persons on whom the right *first* decends ; and therefore, when the time once begins to run, nothing can stop it(*t*)(217). So that on the death of a person in whose life the time first began to run, his heir must enter within the residue of the ten years, although he labored under a disability at the death of his ancestor.

In the late case of *Cotterell v. Dutton*(*u*), a tenant in tail died, leaving the issue in tail a feme covert who died under coverture and left issue two sons, both infants ; the eldest attained twenty-one and died without issue, leaving

(*r*) Ch. 2.

(*s*) See Bro. Reading, p. 60.

(*t*) *Doe v. Jones*, 4 T. Rep. 300 ; *Cotterell v. Dutton*, 4 Taunt. 826.

(*u*) 4 Taunt. 826.

(I) In even the last edition of Bacon's Abridgment, it is stated generally, that the act of 32 Hen. VIII. hath the usual saving for infants, femmes covert, persons in prison, and beyond the sea.

(II) *Note*, Dublin, or any other place in Ireland, is a place within the meaning of the saving of the rights of persons beyond the seas. Anon. 1 Show. 90.

(217) See *Dow v. Warren*, 6 Mass. Rep. 328. *Bunce v. Wolcott*, 2 Conn. Rep. 27. *Griswold v. Butler*, 3 Conn. Rep. 227. and see *Bush v. Bradley*, 4 Day, 298. *Sanford v. Button*, 4 Day, 310. See also, *Peck v. Randall*, 1 Johns. Rep. 165. *Hall's Les. v. Vandegrift*, 3 Binn. 374. *Demarest v. Wyncoop*, 3 Johns. Ch. Rep. 129. *Walden v. Gratz'* heirs, 1 Wheat. 292, 296. *Hudson v. Hudson*, 6 Munf. 352. *Den v. Mulford*, 1 Hayw. 311. Anon. Id. 416. *Pearce v. House*, 2 Tayl. 305. *Faysoux v. Prather*, 1 Nott & M'Cord, 296. *Adamson v. Smith*, 2 Rep. Con. Ct. 269. *Eager v. The Commonwealth*, 4 Mass. Rep. 182. *Mooers v. White*, 6 Johns. Ch. Rep. 372. (*389)

his brother under age, who did not sue forth his writ of formedon within ten years after he attained twenty-one, and more than twenty years had elapsed after the right had first descended. It was held that he was barred by the statute. The ground of this decision was, that the time began to run against the eldest son when he attained twenty-one, and no subsequent disability could stop it; therefore he and his heirs had only ten years from his attainment of twenty-one. This case overruled a notion which had been entertained by some, that issue in tail have distinct and successive rights under the statute, and were not to be barred like the heirs of fee-simple estates. This, however, was decided otherwise. (*)Mr. Justice Heath said, that there was no such difference between the issue in tail and other heirs, as was supposed; formedon in the descender was expressly mentioned in the first clause of the statute: and the point was expressly decided in the same way in the later case of *Tolson v. Kaye*(*x*).

In the case of a fine, it was formerly thought, that if a person died under a disability, his heir was excepted out of the statute of fines, by the proviso(*y*); although the contrary has been determined by a modern case(*z*). In the statute of James, the Legislature being aware of this point, expressly provided for the *death* of the person to whom the *first* right should descend; and, therefore, where a person to whom the right first descended, dies under a disability, his heir must enter within ten years after his death(*a*)(218).

(*x*) 3 Brod. & Bing. 217.

(*y*) See Cruise on Fines, 258, and the cases there cited.

(*z*) *Dillon v. Leman*, 2 H. Black. 584.

(*a*) See *Jenkins*, 4 Cent. pl. 97; *Doe v. Jesson*, 6 East, 80.

(218) See *Smith v. Burtis*, 9 Johns. Rep. 181. *Demarest v. Wyncoop*, 3 Johns. Ch. Rep. 136, 137.

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In the case of *Doe v. Jesson*(*b*), the person upon whom the right first descended was presumed to have died in 1785, *under a disability*, leaving his heir also under a disability. The disability ceased in 1792, but the ejectment was not brought till 1804; more than twenty years had elapsed since the death of the person last seised, and more than ten years had elapsed after the cesser of the disability of the plaintiff; and the Court determined that the ejectment was out of time. Lord Ellenborough held that the person through whom the lessor of the plaintiff claimed, being under a disability at his father's death, when his title first accrued, and dying under that disability, the proviso in the second clause of the statute (where resort is to be had to it, to extend the period for making an entry beyond the twenty years) (*)required the lessor of the plaintiff, as heir to her brother, to make her entry within ten years *after his death*. The word *death* in that clause must mean and refer to the *death of the person to whom the right first accrued*, and whose heir the claimant is, and the statute meant that *the heir* of every person, to which person a right of entry had accrued during any of the disabilities there stated, should have ten years from the death of his ancestor, to whom the right first accrued during the period of disability, and who died under such disability (notwithstanding the twenty years from the first accruing of the title to the ancestor should have before expired). Mr. Justice Lawrence also gave his opinion that the ten years to the heir run from *the death* of the party dying under the disability.

It will appear that it was not necessary for the Court to decide from what period the ten years should run; for more than ten years had elapsed from the time the heir who brought the ejectment attained twenty-one, when

(*b*) 6 East, 80.

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her disability ceased. In the late case of *Cotterell v. Dutton*(c), where this doctrine was stated, the Court was of opinion that *the heir* has ten years *after the disability ceases*, not from the death of *the ancestor* who died under a disability. "The ten years do not run at all while there is a continuance of disabilities"(219). This certainly appears to be the true construction of the statute, and it is the construction which has invariably been adopted in practice.

It seems that where no account can be given of a person within the exceptions in the Act, he will be presumed to be dead at the expiration of seven years from the last account of him(d).

The disability of one coparcener will not preserve the (*)title of the other, who must enter within twenty years after the title accrues, although during the whole time her coparcener labored under a disability(e)(220).

4. It is generally conceived, that a possession for sixty years creates a good title against all the world. Thus Judge Jenkins(f) lays it down, without qualification, "that a peaceable possession for sixty years makes a right; for 21 Jac. 1. c. 16, takes away the entry and assize; 32 Hen. 8, takes away the writ of right and the formedon." So Mr. Justice Blackstone says(g), "that the possession of lands in fee-simple and uninterruptedly for sixty years, is at present a sufficient title against all

(c) 4 Taunt. 826.

(d) *Doe v. Jesson*, *ubi sup.*

(e) *Roe v. Rowleston*, 2 Taunt. 441.

(f) 1 Cent. pl. 49.

(g) 3 Com. 196.

(219) See *Jackson v. Sellick*, 8 Johns. Rep. 202. 2d edit.

(220) See *Sanford v. Button*, 4 Day, 310. The rule is the same in respect to tenants in common. *Doolittle v. Blakesley*, 4 Day, 265, 465. *Bryan v. Hinman*, 5 Day, 211. See *Riden v. Frion*, 2 Murph. 577.

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the world, and cannot be impeached by any dormant claim whatsoever"(221). This, however, Mr. Christian remarks, in a note to the above passage, is far from being universally true; for an uninterrupted possession for sixty years will not create a title, where the claimant or demandant had no right to enter within that time; as where an estate in tail, for life, or for years, continues above sixty years, still the reversioner may enter and recover the estate.

Perhaps this remark is not sufficiently pointed. Blackstone certainly did not mean, that the lawful possession, during sixty years, of a tenant in tail, for life, or for years, would operate as a bar to the reversioner's title, but he alluded to a clear adverse possession for sixty years.

However, even in this light, his position admits of exceptions. It is possible that an estate may be enjoyed adversely for hundreds of years, and may at last be recovered by a remainder-man. For instance, suppose an estate to be limited to one in tail, with remainder over to another in fee, and the tenant in tail to be barred of his (*)*remedy* by the statutes of limitations, it is evident that, as his *estate* subsists, the *remainder-man's right* of entry cannot take place until the failure of issue of the tenant in tail, which may not happen for an immense number of years.

This doctrine is illustrated by the great case of *Taylor v. Horde(h)*, where an estate was settled on several persons successively in tail; remainder to *A.* in fee; and one of the remainder-men in tail, being out of possession, brought an ejectment, which was held to be barred by the statute of limitations. Afterwards all the tenants in tail died without issue, and the then heir at law of *A.* brought an ejectment, within twenty years from the time his

(h) 1 Burr. 60; 5 Bro. P. C. 247; Cowper, 689.

(221) See *Morris' Les. v. Vanderen*, 1 Dall. 67.

remainder fell into possession, and he recovered the estate(222).

5. After passing the act of 32 Henry 8, and before that of the 21 Jac. 1, although a man had been out of possession of land for sixty years, yet if his entry was not tolled, he might enter and bring an action of his own possession(*i*). Some writers have thought this still to be law(*k*), but the rule in this respect was altered by the statute of James; by which no person can now *enter* except within twenty years after his title accrues.

6. The rule in equity, that the statute of limitations does not bar a trust-estate, holds only as between *cestui que trust* and trustee, not between *cestui que trust* and trustee on one side, and strangers on the other(223); for that would be to make the statute of no force at all, because there is hardly an estate of consequence without such a trust, and so the act would never take place.

Therefore, where a *cestui que trust* and his trustee are (*)both out of possession for the time limited, the party in possession has a good bar against both(*l*)(224).

7. Although the statute cannot, as between the trustee and *cestui que trust*, operate as a bar to the latter, yet the

(*i*) See Bevill's case, 4 Co. 11 b.

(*k*) See Wood's Inst. 557; and Christian's note to 3 Black. Com. 196.

(*l*) Per Lord Hardwicke, in *casu* Llewellyn v. Mackworth, Barnard. Rep. Cha. 445; 15 Vin. Abr. 125, n. to pl. 1; and see Townsend v. Townsend, 1 Bro. C. C. 550; Clay v. Clay, 3 Bro. C. C. 639, n.; Ambl. 645; Hercy v. Ballard, 4 Bro. C. C. 469; and Harmood v. Oglander, 6 Ves. jun. 199; 8 Ves. jun. 106; Hovenden v. Lord Annesley, 2 Scho. & Lef. 629.

(222) See Jackson v. Schoonmaker, 4 Johns. Rep. 390. 402. Hall's Les. v. Vandegrift, 3 Binn. 374.

(223) See Wamburzee v. Kennedy, 4 Des. 474. Decouche v. Savetier, 3 Johns. Ch. Rep. 190. Goodrich v. Pendleton, 3 Johns. Ch. Rep. 384.

(224) See Decouche v. Savetier, 3 Johns. Ch. Rep. 216. Goodrich v. Pendleton, 3 Johns. Ch. Rep. 390. Gist v. Cattell, 2 Des. 53.

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trustee may, in some cases, be barred by the possession of the *cestui que trust*, or those claiming under him(*m*). A *cestui que trust* is as a tenant at will to the trustee, and his possession is the possession of the trustee(*n*); and therefore, unless under very particular circumstances, time could not operate as a bar(*o*). Where a *cestui que trust* sells or devises the estate, and the vendee or devisee obtains possession of the title-deeds, and enters, and does no act recognising the trustee's title, there is great reason to contend that this is a disseisin of the trustee, and, consequently, that the statute will operate from the time of such entry. This is a point which daily occurs in practice; but it rarely happens, that a purchaser can be advised to dispense with the conveyance of a legal estate, where the defect will appear on the abstract when he sells. And where there has been any dealing on the legal estate, and it has been recently noticed in the title-deeds as a subsisting interest, it is clear that a purchaser must consider it as such(*p*).

8. The statutes of limitations certainly cannot operate as between *cestuis que trust*; but it seems that equity, in (*)analogy to the statute, will hold time a bar(*q*); and indeed that equitable rights in general will, by the like analogy, be affected by time in the same manner as legal estates(*r*)(225).

(*m*) See *Lord Portsmouth v. Lord Effingham*, 1 Ves. 430; *Harmood v. Oglander*, 6 Ves. jun. 199; 8 Ves. jun. 106. See 2 Mer. 360.

(*n*) See 1 Ventr. 329.

(*o*) See 3 Mod. 149; *Earl of Pomfret v. Lord Windsor*, 2 Ves. 472; *Keene v. Deardon*, 8 East, 248; *Smith v. King*, 16 East, 283.

(*p*) See *Goodtitle v. Jones*, 7 Term Rep. 47.

(*q*) See *Harmood v. Oglander*, *ubi sup.*

(*r*) See 1 Atk. 476; and *Stackhouse v. Barnston*, 10 Ves. jun. 466;

(225) See *Arden v. Arden*, 1 Johns. Ch. Rep. 313. *Decouche v. Savetier*, 3 Johns. Ch. Rep. 190.

This is exemplified, in some degree, by the rules respecting an equity of redemption, which is a mere creature of the Court(s).

In *Clay v. Clay*(*t*), Lord Camden laid down this doctrine very clearly. He said, "as often as Parliament has limited the time of actions and remedies, to a certain period, in legal proceedings, the Court of Chancery adopted that rule, and applied it to similar cases in equity(226). For when the Legislature has fixed the time at law, it would have been preposterous for equity (which by its own proper authority always maintained a limitation) to countenance laches beyond the period that law had been confined to by Parliament. And therefore, in all cases where the legal right has been barred by Parliament, the equitable right to the same thing has been concluded by the same bar."

In *Beckford v. Wade*(*u*), Sir William Grant, in delivering judgment, said, that it is certainly true that no time bars a direct trust as between *cestui que trust* and trustee; but if it was meant to be asserted that a court of equity allows a man to make out a case of constructive trust, at any distance of time after the facts and circumstances (*)happened out of which it arises, he was not aware that there was any ground for a doctrine so fatal to the security of property as that would be; so far from it, that not only in circumstances where the length of time would render it extremely difficult to ascertain the true

Hovenden v. Lord Annesley, 2 Scho. & Lef. 630; *Lord Egremont v. Hamilton*, 1 Ball & Beatty, 516.

(*s*) *White v. Ewer*, 2 Ventr. 340; *Pearson v. Pulley*, 1 Cha. Ca. 109; *Jenner v. Tracey*, and *Belch v. Harvey*, 3 P. Wms. 287, n. See a full note of this case, Appendix, No. 16.

(*t*) 3 Bro. C. C. 639, n.; *Ambl.* 645; and see *Ex parte Dewdney*, 15 Ves. jun. 496; *Medlicott v. O'Donel*, 1 Ball & Beatty, 156.

(*u*) 17 Ves. jun. 97. See 2 Hargr. Jur. Exc. p. 394.

(226) See *Demarest v. Wyncoop*, 3 Johns. Ch. Rep. 129.

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state of the fact, but where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party who, after long acquiescence, comes into a court of equity to seek that relief(227).

And it seems that even in cases of fraud, where the facts constituting the fraud are known, where there is no subsisting trust or continuing influence, the same principle will apply(*x*)(228.)

It was held by Sir William Grant, that whilst the equity of redemption subsists, the question to whom it belongs must remain open : and therefore mere possession without title would not give any person a right to redeem(*y*)(229). The right belonged to him who showed a title, although he had been out of possession upwards of twenty years. But Sir Thomas Plumer decided otherwise, and his decision was affirmed in the House of Lords(*z*). And it seems that unless in the case of disability, twenty years adverse possession is a bar to relief in equity(*a*).

The legal provisions have been so strictly adhered to, that persons laboring under any of the disabilities specified in the statute of limitations, have been allowed the

(*x*) 1 Ball & Beatty, 166.

(*y*) *Cholmondeley v. Clinton*, 2 Mer. 173.

(*z*) 2 Jac. & Walk. 1, 189 n. ; and see *Tweddell v. Tweddell*, 1 Turner, 11, 12.

(*a*) See *Price v. Copner*, 1 Sim. & Stu. 347.

(227) See *Gist v. Cattell's heirs*, 2 Des. 53, 55. *Wamburzee v. Kennedy*, 4 Des. 474, 479. *Spotswood v. Dundridge*, 4 Hen. & Munf. 139. *Redwood v. Reddick*, 4 Munf. 225.

(228) See *Wamburzee v. Kennedy*, 4 Des. 479. *Cook v. Darby*, 4 Munf. 444.

(229) See *Grant v. Duane*, 9 Johns. Rep. 591. on appeal.

same as they would be entitled to in the case of a legal claim(b)(230).

(*)9. These observations may be closed by observing, that few cases occur in which a title depending on the statute of limitations can be recommended. The bare receipt of rent is no ouster, for it is a contradiction in terms, that a man by wrong should have my right(c); so the non-payment of rent is no ouster, and therefore the operation of the statute must frequently be prevented by the existence of a lease granted by the person whose interest, or the interest of persons claiming under him, is wished to be barred. So(d) there may be a case where the circumstance of concealing a deed shall prevent the statute from barring; but then it must be a *voluntary and fraudulent* detaining; for to say that merely having an old deed in one's possession shall deprive a man of the benefit of the act, is going too far, and would be a harsh

(b) *Lytton v. Lytton*, 2 Bro. C. C. 441. Two cases on this point were for a long time depending, *Pimm v. Goodwin*, before Lord Eldon, and *Blake's case* before Lord Manners, in Ireland. See 2 Mer. 240; *Blake v. Foster*, 2 Ball & Beat. 565; *Harrison v. Hollins*, 1 Sim. & Stu. 471.

(c) Gilb. Ten. 97. See acc. *Goodright v. Jones*, Cruise on Fines, 3d edit. 295; *Doe v. Danvers*, 7 East, 299; and see *Orrell v. Maddox*, *Runnington's Eject.* 458; *Saunders v. Lord Annesley*, 2 Scho. & Lef. 73. See and consider *Hovenden v. Lord Annesley*, 2 Scho. & Lef. 623.

(d) *Per* Lord Hardwicke in *casu Llewellyn v. Mackworth*, Barnard. Rep. Cha. 445; 15 Vin. Abr. 126, pl. 8; 2 Eq. Ca. Abr. 579, pl. 9; and see *Dormer v. Parkhurst*, 3 Atk. 124. See also *Snell v. Silcock*, 5 Ves. jun. 469; *Bowles v. Stewart*, 1 Schoale's & Lefroy's Rep. 209; *Bond v. Hopkins*, *ib.* 413; *Hovenden v. Lord Annesley*, 2 Scho. & Lef. 607.

(230) The construction of the statute of limitations is the same in equity as at law. See *Demarest v. Wyncoop*, 3 Johns. Ch. Rep. 129, 139. *Lamar v. Jones*, 3 Har. & M'Hen. 329. *Kane v. Bloodgood*, 7 Johns. Ch. Rep. 90.

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construction of a statute made for the quieting of possessions.

Thus the law stood before the late important Act of 3 & 4 Wil. 4, c. 27. It is seldom possible to understand a law which repeals a former one and substitutes new provisions, unless we have a competent knowledge of the law repealed. It has, therefore, independently of the (*)savings in the Act, been thought useful to retain the foregoing short account of the old law as a fit introduction to the new one.

By the Act referred to it is enacted, that after the 31st day of December 1833, no person shall make an entry or distress or bring an action to recover any land or rent, but *within twenty years* next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims ; or if such right shall not have accrued to any person through whom he claims, then *within twenty years* next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same(I).

(I) The words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows ; (that is to say,) the word "land" shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate, or interest in them or any of them, whether the same shall be a freehold or chattel interest, land whether freehold or copyhold, or held according to any other tenure ; and the word "rent" shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole) ; and the person through whom another

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(*)And it is enacted, that in the construction of the Act the right to make an entry or distress or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned ; (that is to say)

1. When the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, *have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt,* then such right shall be deemed to have *first* accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received.

2. And when the person claiming such land or rent shall claim the estate or interest of *some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt,* then such right shall be deemed to have *first* accrued at the time of such death.

person is said to claim shall mean any person by, through, or under, or by the act of whom, the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat ; and the word " person " shall extend to a body politic, corporate, or collegiate, and to a class of creditors or other persons, as well as an individual ; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing ; and every word importing the masculine gender only shall extend and be applied to a female as well as a male ; sect. 1.

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3. And when the person claiming such land or rent shall claim in *respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt*, then such right shall be deemed to have *first* (*)accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument.

4. And when the estate or interest claimed shall have been *an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest*, then such right shall be deemed to have *first* accrued at the time at which such estate or interest became an estate or interest in possession.

5. And when the person claiming such land or rent, or the person through whom he claims, shall have become entitled *by reason of any forfeiture or breach of condition*, then such right shall be deemed to have *first* accrued when such forfeiture was incurred or such condition was broken(e).

6. But when any right to make an entry or distress or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition shall have *first* accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress or bring an action to recover such

(e) Sec. 3.

land or rent shall be deemed to have *first* accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened(*f*).

7. And a right to make an entry or distress or to bring an action to recover any land or rent shall be deemed to have *first* accrued, in respect of an estate or interest in (*)reversion, at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall, at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent, so that the remainderman is not bound to enter for a forfeiture until his estate fall into possession, nor is his right affected by a possession by him, or any person through whom he claims, previously to the creation of the estate which shall have determined(*g*).

8. An administrator shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration(*h*).

9. And when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued either at the determination of such tenancy, or at the ex-

(*f*) Sec. 4.

(*g*) Sec. 5.

(*h*) Sec. 6.

piration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: provided that no mortgagor or *cestui que* trust shall be deemed to be a tenant at will to his mortgagee or trustee(*i*).

10. And when any person shall be in possession or in receipt of the profits of any land, or in receipt of any (*)rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or to bring an action to recover such land or rent shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen)(*j*).

11. And when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly sum of 20s. or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims, to make an entry or distress or to bring an action after the determination of such lease shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued

(*i*) Sec. 7.

(*j*) Sec. 8.

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upon the determination of such lease to the person right-fully entitled(*k*).

The Act then takes away constructive possession merely by reason of having made an entry, and destroys the effect of continual claim in preserving any right, and provides that the possession of one coparcener, joint (*)tenant or tenant in common, shall not be deemed to have been the possession of the others(*l*).

And it is enacted, that the possession of a younger brother or other relation of the heir shall not be deemed to be the possession of the heir himself(*m*).

But that when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be deemed to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued at the time at which such acknowledgment, or the last of such acknowledgments was given(*n*).

And it is provided, that when no such acknowledgment shall have been given before the passing of the Act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of the Act have been adverse to the right or title of the person claiming to be entitled thereto, then

(*k*) Sec. 9.

(*l*) Sec. 10, 11, 12.

(*m*) Sec. 13.

(*n*) Sec. 14.

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such person, or the person claiming through him, may, notwithstanding the period of twenty years before limited shall have expired, make an entry or distress or bring an action to recover such land or interest at any time within five years next after the passing of the Act(o).

(*)And if at the time at which the right of any person to make an entry or distress or bring an action to recover any land or rent shall have first accrued as aforesaid such person shall have been under any of the disabilities hereinafter mentioned, (that is to say,) infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years before limited shall have expired, make an entry or distress or bring an action to recover such land or rent at any time within ten years next after the time at which the person to whom such right shall first have accrued as aforesaid shall have ceased to be under any such disability, or shall have died (which shall have first happened)(p).

But even in case of disabilities, no action can be brought but within forty years next after the time at which such right shall have first accrued, although the allowed term of ten years shall not have expired(q). Nor is any time beyond the period of twenty years, or the period of ten years allowed by reason of any disability of any other person, or in other words, a succession of disabilities does not extend the time(r).

No part of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjacent to any of them (being part of the dominions of his Majesty), shall be deemed to be beyond seas within the meaning of the Act(s).

(o) Sec. 15.

(q) Sec. 17.

(s) Sec. 19.

(p) Sec. 16.

(r) Sec. 18.

(*404)

The Act then provides that in certain cases the bar shall operate as well against other estates of the claimant as against those in remainder:

1. When the right to an estate in possession is barred (*)by the lapse of time, and such person shall at any time *during the said period* have been entitled to any other estate, interest, right or possibility, in reversion, remainder or otherwise, in or to the same land or rent, no entry, distress or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right or possibility, unless in the mean time such land or rent shall have been recovered by some person entitled to an estate, interest or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession(*t*).

2. And when the right of a tenant in tail shall have been barred by reason of the same not having been made or brought within the period before limited, no entry, distress or action shall be made or brought by any person claiming any estate, interest or right which such tenant in tail might lawfully have barred(*u*).

3. And when a tenant in tail shall have died before the expiration of the period before limited, no person claiming any right which such tenant in tail might lawfully have barred shall make an entry or distress or bring an action but within the period during which, if such tenant in tail had so long continued to live he might have made such entry or distress or brought such action(*x*).

4. And when a tenant in tail shall have made an assurance which shall not operate to bar an estate, to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in posses-

(*t*) Sec. 20.
(*405)

(*u*) Sec. 21.

(*x*) Sec. 22.

sion or receipt of the profits of such land, or in the receipt of such rent, and the same person, or any other person whatsoever (other than some person entitled to (*)such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail), shall continue or be in such possession or receipt for the period of twenty years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then at the expiration of such period of twenty years such assurance shall be effectual as against any person claiming any right to take effect after or in defeasance of such estate tail(y).

It is then enacted, that after the said 31st day of December 1833 suits in equity shall be confined to the period allowed for actions at law(z). And when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him(a). But in every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence

(y) Sec. 23.

(z) Sec. 24.

(a) Sec. 25.

(*406)

might have been first known or discovered; provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the (*)recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud, against any *bona fide* purchaser for valuable consideration who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed(b).

And it is provided, that nothing in the Act contained shall be deemed to interfere with any rule or jurisdiction of courts of equity in refusing relief on the ground of acquiescence or otherwise to any person whose right to bring a suit may not be barred by virtue of this Act(c).

The existing rule as to mortgagees in possession is then adopted. The mortgagor is to be barred at the end of twenty years from the time of taking possession or from the last written acknowledgment; and when there shall be more than one mortgagor, such acknowledgment, if given to any of such mortgagors, or his or their agent, shall be effectual; but where there shall be more than one mortgagee, such acknowledgment, signed by one or more of such mortgagees, shall be effectual only as against the party or parties signing as aforesaid; and where such of the mortgagees as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some interest therein, and not to any ascertained part of the mortgaged money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the

(*)407) (b) Sec. 26.

(c) Sec. 27.

land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage(*d*).

(*)The Act then passes to church property. It prohibits any spiritual or eleemosynary corporation, sole from recovering unless within two incumbencies and six years after a third person shall have been appointed, or within sixty years if those periods shall not amount to sixty years(*e*). And it enacts, that no advowson shall be recovered after the expiration of the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and if not, then for the full period of sixty years in the whole(*f*). But it is provided, that incumbents by reason of a lapse shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but incumbency, in consequence of promotion to a bishoprick, shall, for the purposes of the Act, be deemed a continuation of the incumbency of the clerk so made bishop, or in other words, the first shall be within the provision and the latter not(*g*). And every patron by virtue of any estate, interest or right which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any *quare impedit*, action or suit shall be limited accordingly(*h*). But no advowson shall be recovered after one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation of such person, or of some person through whom he claims,

(*d*) Sec. 28.

(*e*) Sec. 29.

(*f*) Sec. 30.

(*g*) Sec. 31.

(*h*) Sec. 32.

or of some person entitled to some preceding estate or (*)interest, or undivided share, or alternate right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share or right held or derived under the same title(i).

And the Act then provides, that at the determination of the period limited by the Act to any person for making an entry or distress, or bringing any writ of *quare impedit* or other action or suit, the right and title of such person to the land, rent or advowson for the recovery whereof such entry, distress, action or suit respectively might have been made or brought within such period, shall be extinguished(k). This was a proper provision, as under the old law it was considered that although the remedy was barred, the estate did not cease. The receipt of the rent payable by any tenant from year to year, or other lessee, is as against such lessee or any person claiming under him (but subject to the lease), made the receipt of the profits of the land for the purposes of the Act(l).

The Act then proceeds to enact, that all real and mixed actions (except for dower, or a *quare impedit*, or an ejectment), and all plaint (except for freebench), shall cease after the 31st day of December 1834(m). But it is provided, that when on the said 31st day of December 1834, any person who shall not have a right of entry to any land shall be entitled to maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought at any time before the 1st day (*)of June 1835, in case the same might have been

(i) Sec. 33.

(k) Sec. 34.

(l) Sec. 35.

(m) Sec. 36.

(*409) (*410)

brought if the Act had not been made, notwithstanding the period of twenty years before limited shall have expired(*n*). And it is also provided, that when, on the said 1st day of June 1835, any person whose right of entry to any land shall have been taken away by any descent cast, discontinuance or warranty, might maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought after the said 1st day of June 1835, but only within the period during which by virtue of the provisions of the Act an entry might have been made upon the same land by the person bringing such writ or action if his right of entry had not been so taken away(*o*).

It is then enacted, that no descent cast, discontinuance or warranty which may happen or be made after the said 31st day of December 1833, shall toll or defeat any right of entry or action for the recovery of land(*p*). And that after the said 31st day of December 1833, no action or suit or other proceeding shall be brought, to recover any money secured upon any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the mean time some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case the twenty years to run from such payment or acknowledgment(*q*).

(*)After the said 31st day of December 1833, no arrears of dower, nor any damages on account of such arrears,

(*n*) Sec. 37.

(*p*) Sec. 39.

(*o*) Sec. 38.

(*q*) Sec. 40.

(*411)

shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit(*r*). And after that day no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest(*l*), shall be recovered but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover the arrears of interest which shall have become due during the whole time that such prior incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the term of six years(*s*).

The Act is extended to the spiritual court(*t*). But it is not to extend to Scotland; nor is it, so far as it relates to any right to present to or bestow any church, (*)vicarage, or other ecclesiastical benefice—to extend to Ireland(*u*).

(*r*) Sec. 41.

(*s*) Sec. 42.

(*t*) Sec. 43.

(*u*) Sec. 44.

(*l*) I have forbore from making any observation on the particular clauses, as it is too late; but this clause should be modified without loss of time, or the grossest injustice will be committed upon the just rights of legatees and others, particularly infant legatees.

(*412)

All the provisions regarding prescriptions, &c. and limitations of time, were not contained in one act or framed by the same hand. For the use of the real property lawyer, it is still necessary to refer to the leading provisions of the 2 & 3 Wil. 4, c. 71 (I), by which it is enacted, that no claim which may be lawfully made at the common law, by custom, prescription or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of the King, or parcel of the duchy of Lancaster or of the duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, (except such matters and things as are therein specially provided for, and except tithes, rent and services,) shall, where such right, profit or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit or benefit shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing(v).

(*)And that no claim which may be lawfully made at the common law, by custom, prescription or grant, to any way or other easement, or to any watercouse, or the use of any water, to be enjoyed or derived upon, over or from any land or water of the King, or parcel of the duchy of Lancaster or of the duchy of Cornwall, or being

(v) Sec. 1.

(I) It does not extend to Scotland or Ireland.—Sec. 9.

(*413)

land or rent shall be deemed to have *first* accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened(*f*).

7. And a right to make an entry or distress or to bring an action to recover any land or rent shall be deemed to have *first* accrued, in respect of an estate or interest in (*)reversion, at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall, at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent, so that the remainderman is not bound to enter for a forfeiture until his estate fall into possession, nor is his right affected by a possession by him, or any person through whom he claims, previously to the creation of the estate which shall have determined(*g*).

8. An administrator shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration(*h*).

9. And when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued either at the determination of such tenancy, or at the ex-

(*f*) Sec. 4.
(*401)

(*g*) Sec. 5.

(*h*) Sec. 6.

piration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined : provided that no mortgagor or *cestui que* trust shall be deemed to be a tenant at will to his mortgagee or trustee⁽ⁱ⁾.

10. And when any person shall be in possession or in receipt of the profits of any land, or in receipt of any (*)rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or to bring an action to recover such land or rent shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen)^(j).

11. And when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly sum of 20s. or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims, to make an entry or distress or to bring an action after the determination of such lease shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid ; and no such right shall be deemed to have first accrued

(i) Sec. 7.

(j) Sec. 8.

(*402)

time required in claims of *modus decimandi*, or exemption from or discharge of tithes”(1), it is enacted that all prescriptions for any *modus decimandi*, or to any exemption from tithes, by composition real or otherwise, shall, in cases where the render of tithes in kind shall be demanded by the King, or by any duke of Cornwall, or by any lay person, not being a corporation sole, or by any body corporate, whether temporal or spiritual, be deemed good in law, upon evidence showing, in cases of claim of a *modus* the render of such *modus*, and in cases of claim to exemption showing the enjoyment of the land, without render of tithes, money, or other matter in lieu thereof, for thirty years next before the time of such demand, unless, in the case of claim of a *modus*, the actual render of tithes, or of money or other thing differing from the *modus* claimed, or, in case of claim to exemption, the render of tithes, or of money or other matter in lieu thereof, shall be shown to have taken place at some time prior to such thirty years, or it shall be proved that such payment or render of *modus* was made or enjoyment had by some consent or agreement expressly made or given by deed or writing; and if such proof in (*)support of the claim shall be extended to the full period of sixty years next before the time of such demand, the claim shall be deemed indefeasible, unless it shall be proved that such payment or render of *modus* was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing.

And where the render of tithes in kind shall be demanded by any archbishop, or other corporation sole, whether spiritual or temporal, every such prescription

(1) It does not extend to Ireland (sec. 9.); nor to suits commenced at a day now past (sec. 3.); and there is a further exception as to tithes then let or compounded for.—See sec. 4.

(*416)

shall be indefeasible, upon evidence showing such render of modus made or enjoyment had, as before mentioned applicable to the nature of the claim, during the time that two persons in succession shall have held the office or benefice in respect whereof such render of tithes shall be claimed, and for not less than three years after the appointment and institution or induction of a third person thereto: provided always, that if the whole time of the holding of such two persons shall be less than sixty years, then it shall be necessary to show such render of modus made or enjoyment had, not only during the whole of such time, but also during such further number of years either before or after such time, or partly before and partly after, as shall with such time be sufficient to make up the period of sixty years, and also during the further period of three years after the appointment and institution or induction of a third person to the same office or benefice, unless it shall be proved that such payment or render of modus was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing(e).

And it is enacted, that every composition for tithes which hath been made or confirmed by the decree of any (*)court of equity in England in a suit to which the ordinary, patron and incumbent were parties, and which hath not since been set aside, abandoned or departed from, shall be valid in law; and that no modus or exemption shall be deemed to be within the provisions of the Act, unless the same shall be proved to have existed and been acted upon at the time of or within one year next before the passing of the said Act(f).

But it is provided, that where any lands or tenements shall have been or shall be held by any person entitled

(e) Sec. 1.

(f) Sec. 2.

to the tithes thereof, or by any lessee of any such person, or by any person compounding for tithes, or by any tenant whereby the right to the tithes of such lands or tenements may have been or may be during any time in the occupier thereof, or in the person entitled to the rent thereof, the whole of such time shall be excluded in the computation of the several periods of time therein-before mentioned(*g*).

And it is also provided, that the time during which any person otherwise capable of resisting any claim shall have been or shall be an infant, idiot, non compos mentis, feme covert, or lay tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods herein-before mentioned, except only in cases where the right or claim is thereby declared to be absolute and indefeasible(*h*). And after providing for the manner in which in actions and suits the modus or exemption may be alleged(*i*), it is enacted, that no presumption shall be allowed or (*)made in favor or support of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in the Act as may be applicable to the case and to the nature of the claim(*k*)(I).

(*g*) Sec. 5.

(*i*) Sec. 7.

(*h*) Sec. 6.

(*k*) Sec. 8.

(I) For the new limitation upon actions of debt for rent, or upon any bond, &c. see 3 & 4 W. 4, c. 42, s. 3, 4, 5 & 7, which last section, it should be remembered, applies generally to the 21 Jac. 1.

(*418)

(*)CHAPTER VIII.

OF THE TIME ALLOWED TO COMPLETE THE CONTRACT.



IN sales by private agreement it is usual to fix a time for completing the contract. In such a contract the word *month* may be construed either lunar or calendar, according to the intention of the parties, to be collected from the whole instrument taken together(*a*). The time fixed is, at law, deemed of the essence of the contract(*b*)(232); for it is the duty of the seller to be ready to verify the abstract on the day on which it was agreed that the purchase should be completed; and if he have not the title deeds in his possession, or the abstract set forth a defective title, the purchaser may resist the completion of the contract, and recover his deposit.

In a late case, however(*c*), upon a sale by auction, the conditions stipulated that the abstract should be delivered to the purchaser *within a fortnight*, and should be returned at the end of *two months*; that a draft of the conveyance should be delivered to the purchaser within *three months*, and be returned to the seller within *four months*; and that the remainder of the purchase-money

(*a*) Lang v. Gale, 1 Mau. & Selw. 111.

(*b*) Berry v. Young, 2 Esp. Ca. 640, n.

(*c*) Lang v. Gale, 1 Mau. & Selw. 111.

(232) So, in equity, time may be of the essence of a contract. *Benedict v. Lynch*, 1 Johns. Ch. Rep. 370. Though mere lapse of time is not, in all cases, an objection to decreeing a specific performance. *Walters v. Travis*, on appeal, 9 Johns. Rep. 450. See *Thompson v. Ketcham*, 8 Johns. Rep. 146. 2d edit.

should be paid on the 24th *day of June* then next (which was five months after the sale), when the purchaser should receive his conveyance duly executed by all parties ; to be prepared by the seller's attorney, at the expense of the purchaser. It was contended that the stipulation in (*) regard to the delivery of the conveyance was not a condition precedent, and it was compared to the case of *Hall v. Cazenove*(*d*), where a charter-party contained a covenant by the owner, that the ship should sail on a specified day, and the owner afterwards brought an action of covenant for the freight ; it was held that he need not aver that the ship sailed on that day, although the defendant (the freighter) covenanted to pay the freight in consideration of every thing above mentioned. It was not necessary to decide the point ; but Le Blanc, J. said, that it was clear that it was a condition precedent that a draft of the conveyance should be delivered to the purchaser ; the question was, whether it must be done by a particular day. It was not necessary, however, to enter upon that question ; if it were, it might perhaps be material to advert to the rule, that where a condition does not go to the whole consideration(*e*) of the contract, but to a part only, it is not a condition precedent. Bayley, J. was of the same opinion. It was not a condition precedent that the draft should be delivered by a particular day, for he did not consider the precise time of the delivery as an essential ingredient in that condition which was meant only to secure a delivery within a reasonable time.

The general opinion has always been, that the day fixed was imperative on the parties at law. This was so laid down by Lord Kenyon, and has never been doubted in practice. The contrary rule would lead to endless

(*d*) 4 East, 477.

(*e*) See *Havelock v. Geddes*, 10 East, 564.

{*420)

difficulties. In the above case, for example, the different times appointed, 1. for delivery of the abstract; 2. for the return of it; 3. for the delivery of the conveyance; 4. for the return of it; and 5. for the completion of the purchase, were all links of the same chain, and if one (*)link were broken, the whole chain would be destroyed. If the time appointed for the delivery of the conveyance was not an essential ingredient, but was meant only to secure a delivery within a reasonable time, it follows that the same rule must apply to the time fixed for the return of it, and also to the time appointed for the completion of the purchase. The effect of this rule would be, that the appointment of a day would have no effect, and in every case it must be referred to a jury to consider whether the act was done within a reasonable time. The precise contract of the parties would be avoided, in order to introduce an uncertain rule, which would lead to endless litigation. This cannot be compared to a case like *Hall v. Cazenove*: there the ship did sail without being countermanded, and the substance of the covenant was considered to be, that the ship should go to the place named on freight and return again, and if the freighter sustained any damage by reason of the ship not having sailed on the particular day, he might recover it by bringing an action on the covenant. In favor of justice the covenants were not considered as dependent on each other. It would be monstrous that the ship should be permitted to sail to the place named, and return again, and yet not earn any freight, because it did not sail on the day appointed. So where covenants go only to a part of the consideration, and a breach may be paid for in damages, the defendant has a remedy on the covenant, and shall not plead it as a condition precedent. If *A.* covenant with *B.* to build a house for him according to a certain plan, and *B.* covenant with *A.* to pay for the house so

built, it is clear, notwithstanding some authorities to the contrary, that if *A.* build a house, although not strictly according to the plan, yet *B.* must pay for it, and may recover in a distinct action against the builder for any (*)damage sustained by the departure from the plan. The justice of this is evident. But in the case under consideration, the agreements go to the whole consideration on both sides; they are mutual conditions; the one precedent to the other(*f*). If the draft of the conveyance, for instance, is not delivered on the day appointed, the party who ought to deliver it has broken his agreement, and cannot therefore recover upon it at law. This works no injustice; for the further execution of the contract is at once stopped; the seller retains his estate, and the purchaser his purchase-money, and the party making default is liable, as he ought to be, to an action for breach of his engagement. It is to be hoped, therefore, that the day appointed will always be deemed of the essence of the contract at law. It has so been held in a recent case in the Common Pleas(*g*). And in a later case upon a sale of goods, where fourteen days were allowed from the day of sale *to the purchaser* to clear away the goods, the seller was not prepared to deliver them the day after the sale to the purchaser, who applied for them; and it was held, that he (the seller) had broken his agreement, and could not recover against the purchaser, who refused to perform the contract(*h*). Where the purchaser by a covenant in the contract, was to pay a further sum of money, provided the adjoining houses should be completed, that is, paved in front, &c. before a day named, and the pavement was not completed until after the day ap-

(*f*) *Boone v. Eyre*, 1 H. Blackst. 273. See 10 East, 564.

(*g*) *Wilde v. Forte*, 4 Taunt. 334.

(*h*) *Hagedon v. Laing*, 1 Marsh. 514; and see *Cornish v. Rowley*, *post*.

(*422)

pointed, although the delay was occasioned by the bad weather, which prevented the workmen from proceeding, yet the seller was held not entitled to recover the 80*l.*(*i*). (*) But a party may even at law waive the forfeiture, and enlarge the time of his contract(*j*).

And *equity*, which from its peculiar jurisdiction is enabled to examine into the cause of delay in completing a purchase, and to ascertain how far the day named was deemed material by the parties, will in certain cases carry the agreement into execution, notwithstanding that the time appointed be elapsed(233); for, as Lord Eldon remarks, the title to an estate requires so much clearing and inquiry, that unless substantial objections appear, *not merely as to the time*, but an alteration of circumstances affecting the value of the thing; or objections arising out of circumstances, *not merely as to the time*, but the conduct of the parties during the time; unless the objection can be so sustained, many of the cases go the length of establishing, that the objections cannot be maintained(*k*)(234). Perhaps there is cause to regret that even *equity* assumed this power of dispensing with the literal performance of contracts in cases like these.

Objections on account of delay seem divisible into two kinds. The one where the delay is attributable to the neglect of either party; the other where the delay is

(*i*) *Maryon v. Carter*, 4 Carr. & Pay. 295.

(*j*) *Carpenter v. Blandford*, 8 Barn. & Cress. 575.

(*k*) *Per*, Lord Eldon, see 7 Ves. jun. 274; and see *Hearne v. Tenant*, 13 Ves. jun. 287. See *Lennon v. Napper*, 2 Scho. & Lef. 683.

(233) See *Waters v. Travis*, on appeal, 9 Johns. Rep. 450.

(234) So, if on the other hand, from the lapse of time, circumstances have been so changed, that a specific performance, such as would answer the ends of justice, has become impossible, the objection is decisive. *Pratt v. Carroll*, 8 Cranch, 471. *Pratt v. Law*, 9 Cranch, 456, 494.

unavoidably occasioned by the state of the title ; and of each of these we shall treat in its order.



(*)SECTION I.

Of Delays occasioned by the Neglect of either Party.



THE time fixed on for the completion of a contract, had formerly less attention paid to it in equity than is now given to it, which seems to have arisen from the case of *Gibson v. Paterson*(*l*), where, according to the report, a specific performance was decreed in favor of the plaintiff, the vendor, without any regard had to his negligence in not producing his title-deeds, &c. within the time limited. And Lord Hardwicke is reported to have said, that most of the cases which were brought into the Court, relating to the execution of articles for the sale of an estate, were of the same kind, and liable to that objection ; but that he thought there was nothing in the objection.

It appears, however, that this case is mis-reported ; for Lord Rosslyn, in *Lloyd v. Collet*(*m*), said he had looked into the case of *Gibson v. Paterson*, in which the reporter had made Lord Hardwicke treat the time as totally immaterial. He said, it was to be observed, that the circumstances of that case, of which he had taken a copy, did not call for any such opinion. The purchaser, who hung back, had bought an estate in mortgage. The contract

(*l*) 1 Atk. 12.

(*m*) 4 Ves. jun. 690, n. ; and see 4 Bro. C. C. 497. See *Radcliffe v. Warrington*, 12 Ves. jun. 326 ; *Alley v. Deschamps*, 13 Ves. jun. 225.

(*424)

took place in November, and was to be completed in February; in that time, therefore, the mortgage could only be paid off by treaty with the mortgagee. Upon the facts it appeared, that application had been made to the mortgagee, who consented to take his money. Drafts of conveyance were made, and countermanded by the (*)purchaser. He had, after the contract, demised part of the estate to the vendor at a rent; and, upon application being made to him, every thing being ready, he said he would be off the bargain; he had no money to pay for it; and if they attempted to force him, he would go to Scotland to avoid it. Lord Rosslyn added, there could not be the smallest argument upon it, nor the least doubt about the decree.

But whatever opinion Lord Hardwicke entertained on this subject(n), it is now settled, that a man cannot call upon a court of equity for a specific performance, unless he has shown himself ready, desirous, prompt and eager; and therefore time alone is a sufficient bar to the aid of the Court(235).

Thus in a case(o) where the parties differed as to the construction of an agreement, and after a delay of seven years one of the parties filed a bill for a specific performance, it was dismissed merely on account of the staleness of the demand.

A bill for a specific performance is an application to the discretion, or rather to the extraordinary jurisdiction

(n) See 1 Ves. 450.

(o) *Milward v. Earl of Thanet*, 5 Ves. jun. 720, n. (b). See *Alley v. Deschamps*, 13 Ves. jun. 225.

(235) See *Pratt v. Carroll*, 8 Cranch, 471. *Pratt v. Law*, 9 Cranch, 456, 494. *Somerville v. Trueman*, 4 Har. & M'Hen. 43. *Benedict v. Lynch*, 1 Johns. Ch. Rep. 370. In equity, time may be dispensed with, if it be not of the essence of the contract. *Hepburn v. Auld*, 5 Cranch, 262.

of equity, which cannot be exercised in favor of persons who have long slept upon their rights, and acquiesced in a title and possession adverse to their claim. Due diligence is necessary to call the Court into activity, and where it does not exist, a court of equity will not lend its assistance; it always discountenances laches and neglect(*p*)(236).

If the vendor be not ready with his abstract and title-deeds at the day fixed, the purchaser may avoid the agreement at law.

(*) Thus, in a case(*q*) where upon a sale it was agreed that a good title should be made out by the 10th of July; in the beginning of July the purchaser called on the vendor to show him the title-deeds; but he not having them in his possession, gave the purchaser an abstract of the title, which did not contain any of the deeds; and although it was suggested that an application ought to have been made to the vendor at an earlier period, yet Lord Kenyon ruled otherwise, as the seller, he said, ought to be prepared to produce his title-deeds at the particular day.

This rule does not, however, prevail in equity; for it is there considered equally incumbent on the purchaser to ask for the abstract, as for the vendor to deliver it. And, therefore, if a purchaser do not call for the abstract before the time agreed upon for its delivery(*r*), or do not ask for it until it has become impossible to execute the

(*p*) *Per* Lord Mannors, 1 Ball & Beatty, 68.

(*q*) *Berry v. Young*, 2 Esp. Ca. 640, n.; *vide supra*, p. 419.

(*r*) *Guest v. Homfrey*, 5 Ves. jun. 818.

(236) See *Benedict v. Lynch*, 1 Johns. Ch. Rep. 370, 375. *Halch v. Cobb*, 4 Johns. Ch. Rep. 559. *Kempshall v. Stone*, 5 Johns. Ch. Rep. 194. *Higginbotham v. Burnet*, 5 Johns. Ch. Rep. 184. *Pratt v. Carrott*, 8 Cranch, 471. *Pratt v. Law*, 9 Cranch, 456, 494. *Colcock v. Butler*, 1 Des. 307. *Butler v. O'Hear*, 1 Des. 382, 398.

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agreement by the day fixed(s), equity will consider the time as waved.

So, if the purchaser receive the abstract after the day appointed, and do not at the time object to the delay, he cannot afterwards insist upon it as a bar to a performance *in specie*(t).

It is, however, clearly settled, that a specific performance shall not be enforced, where no steps have been taken by the vendor, although in proper time urged by the purchaser to do so, and the purchaser, immediately when the time is elapsed, insists upon his deposit, and refuses to perform the agreement.

This was decided in *Lloyd v. Collett*(u); the case was, (*)that on the 10th August 1792, the defendant contracted for the purchase of the estate, the purchase to be completed on or before the 25th of March 1793, and had frequently between those times applied for an abstract of the title, but could not obtain one. Shortly after the 25th of March 1793, the purchaser applied for his deposit, with interest from the 10th of August 1792, when he paid it; and afterwards repeatedly applied for it before the 10th of June 1793, when he brought an action for the deposit. On the 16th September 1793, an abstract was delivered; the purchaser was then out of town, and on his return, on the 25th of October, wrote, insisting that he would not complete his purchase. On the 6th of November the bill was filed by the vendor for a specific performance, and for an injunction to restrain the proceedings at law. Lord Rosslyn said, the conduct of parties, inevitable

(s) *Jones v. Price*, 3 Anstr. 924.

(t) *Smith v. Burnam*, 2 Anstr. 527; and see *Seton v. Slade*, 7 Ves. jun. 265.

(u) 4 Bro. C. C. 469; 4 Ves. jun. 689. See 5 Ves. 737; 7 Ves. jun. 278; and see *Pincke v. Curteis*, stated *infra*; *Potts v. Webb*, 4 Bro. C. C. 330, cited; *Paine v. Meller*, 6 Ves. jun. 349; and *Warde v. Jeffery*, 4 Price, 294.

accident, &c. might induce the Court to relieve ; but it was a different thing to say, that the appointment of a day was to have no effect at all, and that it was not in the power of the parties to contract, that if the agreement was not executed at a particular time, the parties should be at liberty to rescind it. And he therefore considered the contract as at an end.

But where a vendor has proceeded to make out his title, and has not been guilty of gross negligence, equity will assist him, although the title was not deduced at the time appointed(237).

Thus, in *Fordyce v. Ford*(*x*), the purchase was to be completed on the 30th July 1793. The abstract was not delivered until the 8th, and the treaty continued until the 25th of September, on which day the deeds were delivered, (*)and every difficulty cleared up ; when the purchaser refused to proceed, alleging that he wanted the estate for a residence for the last summer, and insisting he was not bound to go on, on account of the delay. The Master of the Rolls said, the rule certainly was, that where in a contract either party had been guilty of gross negligence, the Court would not lend its assistance to the completion of the contract ; but in this case he thought there had been no such negligence, and decreed accordingly ; adding, that he hoped it would not be gathered from thence, that a man was to enter into a contract, and think he was to have his own time to make out his title.

The rules on this subject apply, as they ought to do, to each party. And therefore, where a purchaser permits a long time to elapse, without evincing a fixed marked intention to carry his contract into execution, he will be

(*x*) 4 Bro. C. C. 494 ; *Radcliffe v. Warrington*, 13 Ves. jun. 323.

(237) As to the extension of time for completing the title, see *Hepburn v. Dunlop*, 1 Wheat. 179, 196. *Hepburn v. Auld*, 5 Cranch, 262. See also, *Ramsay v. Brailsford*, 2 Des. 583.

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left to his remedy at law, although he may have paid part of the purchase-money. He is not to be suffered to lie by, and speculate on the estate rising in value(*y*). Nor will he be assisted by equity, where he has made frivolous objections to the title, and trifled, or shown a backwardness to perform his part of the agreement, especially if circumstances are altered(*z*). And where the price is unreasonable or inadequate, or the contract is in other respects inequitable, equity will not assist either party, if he has permitted the day appointed for completing the contract to elapse without performing his part of the agreement(*a*).

(*)The time, however, is more particularly attended to in sales of reversion: for it is of the essence of justice that such contracts should be executed immediately, and without delay. No man sells a reversion who is not distressed for money; and it is ridiculous to talk of making him a compensation by giving him interest on the purchase-money during the delay(*b*).

So time is very material where the estate is sold in order to pay off any incumbrance bearing a higher rate of interest than the vendor is entitled to receive, in respect of the purchase-money, during the delay(*c*); or the estate is sold for the purposes of a trade or manufacto-

(*y*) *Harrington v. Wheeler*, 4 Ves. jun. 686; *Alley v. Deschamps*, 13 Ves. jun. 225.

(*z*) *Hayes v. Caryll*, 1 Bro. P. C. 27; 5 Vin. Abr. 538, pl. 18; *Spurrier v. Hancock*, 4 Ves. jun. 667; *Pope v. Simpson*, 5 Ves. jun. 145; and *Coward v. Odingsale*, 2 Eq. Ca. Abr. 688, pl. 5; and see *Green v. Wood*, 2 Vern. 632; *Bell v. Howard*, 9 Mod. 302; and *Main v. Melbourn*, 4 Ves. jun. 720.

(*a*) *Vide ante*, ch. 5; and *Whorwood v. Simpson*, 2 Vern. 186; *Lewis v. Lord Lechmere*, 10 Mod. 503.

(*b*) *Newman v. Rodgers*, 4 Bro. C. C. 391; and see *Spurrier v. Hancock*, 4 Ves. jun. 667.

(*c*) *Popham v. Eyre*, Lofft, 786; and see a case cited in 2 Scho. & Lef. 604.

ry(*d*) ; or the subject of the contract is in its nature of a fluctuating value(*e*).



SECTION II.

Of Delays occasioned by the State of the Title.



It may be laid down as a general proposition, that a delay accounted for on the above ground will not prevent a specific performance being decreed, where the time fixed for completing the contract is not material. Thus, if an estate was described as in good repair, and it turned out to be in bad repair, and several months may be required to repair it, yet the purchaser cannot resist the contract on the ground of time, unless it could be clearly shown, that he wanted possession of the house to live in at a given period, by which time the repairs could not be (*)completed(*f*). So if the estate is in lease, and it was stated that the purchaser would be entitled to possession several months before the lease actually expire, yet he cannot rescind the agreement, unless the personal occupation of the estate was essential to him at the time appointed(*g*).

Where time is not material, and the title is bad, but the defect can be cured, if the vendee is unwilling to stay,

(*d*) *Parker v. Frith*, 1 Sim. & Stu. 199 ; *Wright v. Howard*, *ib.* 190 ; *Coslake v. Tilt*, 1 Russ. 376.

(*e*) *Doloret v. Rothschild*, 1 Sim. & Stu. 590.

(*f*) See *Dyer v. Hargrave*, 10 Ves. jun. 505, *supra*, p. 290.

(*g*) *Hall v. Smith*, Rolls, 18 Dec. 1807, MS. ; S. C. 14 Ves. jun. 426 ; and see 13 Ves. jun. 77.

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the vendor should file a bill in equity to enforce the performance of the contract(*h*) ; for it is sufficient if the party entering into articles to sell has a good title at the time of the decree ; the direction of the Court being, in all these cases, to inquire whether the seller *can*, not whether he *could*, make a title at the time of executing the agreement(238).

This principle was followed in a case of frequent reference(*i*). And in a late case(*k*), the vendor, at the time he filed the bill for a specific performance, had only a term of years in the estate, of which he had articted to sell the fee-simple, and after the bill was filed, procured the fee by means of an act of parliament ; and as the day on which the contract was to be carried into execution was not material, a specific performance was decreed.

The same rule prevails at law, *where no time is fixed for completing the contract*, and an application for the title has not been made by the purchaser previously to an action by the vendor for breach of contract. For in *Thompson v. Miles*(*l*), a man agreed to sell a term of (*)which he stated forty years to be unexpired. It appeared there were only thirty-nine, but by an agreement indorsed on the lease, the lessor agreed to add one year to the unexpired term. This agreement was dated after an action brought by the vendor for damages on breach of agreement ; and Lord Kenyon ruled, that the vendor having at that time a good title was sufficient. His

(*h*) See 6 Ves. jun. 655 ; 10 Ves. jun. 315.

(*i*) *Langford v. Pitt*, 2 P. Wms. 629 ; and see *Jenkins v. Hiles*, 6 Ves. jun. 646 ; *Seton v. Slade*, 7 Ves. jun. 265.

(*k*) *Wynn v. Morgan*, 7 Ves. jun. 202.

(*l*) 1 Esp. Ca. 184 ; see *Willett v. Clarke*, 10 Price, 207.

(238) See *Hepburn v. Auld*, 5 Cranch, 262. See also *Hepburn v. Dunlop*, 1 Wheat. 179, 195. *Clute v. Robison*, on appeal, 2 Johns. Rep. 595.

Lordship said, that it had been solemnly adjudged, that if a party sells an estate without having title, but before he is called upon to make a conveyance, by a private act of parliament gets such an estate as will enable him to make a title, that is sufficient: that here the plaintiff being enabled to make a title, and the defendant never having applied for it, he should not be allowed to set up against the plaintiff a want of title, though the power of making that title was obtained after the action was brought.

But if the vendor cannot verify his abstract at the time appointed, or if he produce a defective title, and the purchaser bring an action for recovery of the deposit, the vendor having a title at the time of the trial will not avail him. Thus, in *Cornish v. Rowley*(*m*), where a purchaser sought to recover his deposit, it appeared that the abstract of the title began in the year 1793, and after reciting that the deeds relating to the estate had been lost, stated a fine and non-claim. Upon inquiry, it was found that the fact of the deeds having been lost was not true. The counsel for the defendant said they were ready to make out a good title. Lord Kenyon said, that the vendor must be prepared to make out a good title on the day when the purchase is to be completed. Indulgence, he was aware, was often given for the purpose of procuring probates of wills, &c. But this indulgence was voluntary on the part of the intended purchaser. It is the duty of (*)the seller to be ready to verify his abstract at the day on which it was agreed that the purchase should be completed. If the seller deliver an abstract, setting forth a defective title, the plaintiff may object to it. No man was ever induced to take a title like the present. A fine and non-claim are good splices to another title, but they will not do alone. There are many exceptions in the statute in favor of infants, femmes covert, &c. As a good title was

(*m*) B. R. Midd. Sitt. after M. T. 40 Geo. III. ; 1 Selw. N. P. 160.
(*432)

not made out at the day fixed, he should direct the jury to find a verdict for the deposit, with interest up to that day. And a verdict was found by the jury accordingly.

So, in *Bartlett v. Tuchin*(*n*), assignees of a bankrupt sold an estate, and no time was fixed for completing the purchase. The purchaser upon a supposed defect of title abandoned the contract; *afterwards* the commission was superseded, and a new one issued, under which the same assignees were chosen. It was held that the purchaser might rescind the contract, for at the time he gave notice of his abandonment of the contract, the assignees could not make out a good title. And in a late case(*o*), the facts were, that upon a sale it was agreed that the purchase-money should be paid on or before Lady-day 1803, on having a good title. The vendors were assignees of a bankrupt who claimed under a will. They thought that he had an estate-tail under the will, and that therefore they could make a title; but under the devise he only took for life, with contingent remainders over. The bankrupt, however, being heir at law of the testator, could make a title by levying a fine, and was willing to join; but these facts were not stated in the abstract delivered, or communicated to the purchaser until a fortnight before (*)the assizes. The Court, after showing that the bankrupt took only an estate for life under the devise to him, said, as it was stated, that previous to the time fixed for payment of the money, and completion of the purchase, or indeed till near the time of trial, no information was given to the purchaser that the bankrupt was heir at law of the testator, but the title of the assignees appeared to have

(*n*) 1 Marsh. 583. See *Goodwin v. Lightbody*, 1 Dan. 153; *Roper v. Coombes*, 6 Barn. & Ald. 584.

(*o*) *Seward v. Willock*, 5 East, 198; 1 Smith's Rep. 390, S. C.; and see *Radcliffe v. Warrington*, 12 Ves. jun. 326, where the purchaser recovered at law.

been delivered in, on the supposition of the bankrupt being tenant in tail, they thought that the defendant had failed in making good the agreement on his part ; and that thereupon a right of action at law had accrued to the plaintiff. How far the title since communicated might in another course of proceeding in another place, render the present proceeding abortive ; and whether the plaintiff might not be ultimately compelled to fulfil his agreement, was not for them in that action to decide.

In an early case(*p*) the Court of Chancery carried this doctrine very far ; for at the time of the articles for sale, or even when the decree was pronounced, Lord Stourton, the vendor, could not make a title, the reversion in fee being in the Crown ; and yet the Court indulged him with time more than once for the getting in the title from the Crown, which could not be effected without an act of parliament, to be obtained in the following session : however, it was at length procured, and Sir Thomas Meers decreed to be the purchaser(*I*) ; and even at this day, although the Master report against the title, yet if it appear that the seller will have a title upon getting in a term, (*)or procuring letters of administration, &c. the Court will not release the purchaser ; but will put the vendor under terms to complete his title speedily(*pp*). Or if a new fact appear which enables him to make a title when the cause is before the Court on further directions, the contract will be enforced(*q*), but the Court will not extend the rule

(*p*) Lord Stourton *v.* Sir Thomas Meers, stated in 2 P. Wms. 631 ; and see Sheffield *v.* Lord Mulgrave, 2 Ves. jun. 526 ; Ormerod *v.* Hardman, 5 Ves. jun. 722.

(*pp*) Coffin *v.* Cooper, 14 Ves. jun. 205.

(*q*) Esdaile *v.* Stephenson, 8 Aug. 1822, MS. *supra*, p. 219.

(*I*) Note, it appears that Sir Thomas Meers was mortgagee of the estate ; (see Sir Thomas Meers *v.* Lord Stourton, 1 P. Wms. 46,) and it is therefore probable that at the time he entered into the contract he was aware of the defects in the title.

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which it has adopted of compelling a purchaser to take the estate where a title is not made till after the contract, to any case to which it has not already been applied. Therefore in a case where upon a creditor's bill filed for sale of the real estate of a trader, the usual accounts were decreed and a sale ordered, and the estates were accordingly sold; but it afterwards appeared that the fact of the trading was not regularly proved, and then the cause was re-heard, the decree upon which re-hearing was also open to objection; the purchaser under the decree was upon motion relieved from his purchase, although the parties were willing to take steps to remove the objections(*r*).

And where a purchaser enters into, or proceeds in a treaty, after he is acquainted with defects in the title, and knows that the vendor's ability to make a good title depends on the defects being cured, he will be held to his bargain, although the time appointed for completing the contract is expired and *considerable further time* may be required to make a good title.

Thus in a case(*s*), where it was agreed upon a purchase, that it should be completed on the 5th April 1792, (*)it appeared that the purchaser had applied for an abstract at the latter end of January, or the beginning of February, which not being sent to him, he, after the expiration of the time for the completion of the purchase, applied for his deposit, saying, that he should not proceed in his purchase. About the 21st of April, an abstract was sent him, and it appeared that a suit in Chancery

(*r*) *Lechmere v. Brasier*, 2 Jac. & Walk. 287; *Dalby v. Pullen*, 3 Sim. 29; 1 Russ. & Myl. 296; *Coster v. Turnor*, 1 Russ. & Myl. 311.

(*s*) *Pincke v. Curteis*, 4 Bro. C. C. 329; and see *Smith v. Burnam*, 2 Anstr. 527; and *Paine v. Meller*, 6 Ves. jun. 349; *Warde v. Jeffery*, 4 Price, 295; see *Smith v. Sir Thomas Dolman*, 6 Bro. P. C. 291, by Tomlins.

must be determined before a title could be made, upon which he again declared he would not proceed in the purchase, and again required his deposit. In Trinity term he brought an action for his deposit, and, on the 6th of November, the bill was filed. The purchaser, by his answer, stated that the suit was still depending, and that questions of law had arisen, which then stood for argument in the Court of King's Bench.

The Lords Commissioners Ashhurst and Wilson granted an injunction, which was continued by Lord Rosslyn, who said, in these contracts (sales by auction) in general, the time of completing the contract is specified, and a deposit is paid; and if the title is not made out by the time, the vendee is entitled to take back his deposit. But in this case *the vendee was apprised of the title depending on the ability of the vendors to make a good title, which itself depended on the event of a Chancery suit, and was, notwithstanding, willing to go on with his purchase; there had been a communication of the delay of the suit, and the present bill was filed after great delay*(1). If the vendee had called for his deposit at the end of the time limited for completing the purchase, and insisted he would not go on with his purchase, the Court would not have compelled him. The cause was afterwards heard before (*)the Master of the Rolls, who was also of opinion, that there had been a sufficient communication of the real state of the delay, and that the purchaser had acquiesced in it, or at least not sufficiently declared his dissent to go on with the purchase; and therefore it was referred to the Master to inquire as to the title.

So in *Seton v. Slade*(t), it appeared that the purchaser

(t) 7 Ves. jun. 265. See *Wood v. Bernal*, 19 Ves. 220.

(I) The judgment shows the true ground of the decree; but according to the state of facts in the report, the case was similar to that of *Lloyd v. Collet*, stated, *supra*, p. 424.

(*436)

was aware of the objections to the title at the time he purchased the estate, and afterwards accepted the abstract within a few days of the time appointed for completing the contract. He had, however, previously declared, that if the title was not made out by the time, he would relinquish the contract; and the day after the time appointed he actually applied for his deposit, alleging that the abstract, so far from showing a right in the vendor to convey, stated merely a contract for the purchase by him, without noticing a suit in Chancery. But the purchaser having been aware of the objections to the title, and having afterwards received the abstract, a specific performance was decreed.

Again(*u*), where personal representatives of a trustee supposing erroneously they had power to sell, entered into a contract for sale, and when the mistake was discovered, the purchaser was apprised that the sellers would take the necessary steps to make a title, which they did, but before they were completed, the purchaser brought an action for his deposit, which he recovered, and then the others filed a bill for a specific performance; it was held that the purchaser, if he had thought fit, might have declined the contract as soon as he discovered that the plaintiffs had no title, and he was not bound to wait until they had acquired a title; but he not having taken that (*)course, it was enough that at the hearing a good title could be made.

Although a treaty may have lain dormant for some time, yet if the contract is not abandoned, a performance will be decreed *in specie*.

Thus in a case(*x*) where, upon objections to a title, the treaty had proceeded for about two years, when the ven-

(*u*) Hoggart v. Scott, 1 Russ. & Myl. 293.

(*x*) Marquis of Hertford v. Boore, 5 Ves. jun. 719. See Milward v. Earl of Thanet, 5 Ves. jun. 720, n. (*b*).

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dor's solicitor wrote, calling for a distinct answer, saying, that otherwise he must be under the necessity of filing a bill. No answer was returned to the letter, nor was any notice given that the purchaser considered the contract as abandoned; neither had he brought any action for the deposit. The bill was filed after a delay of about fourteen months, and the defendant resisted a specific performance on the ground of delay, by which, he stated, he had suffered material inconvenience, having purchased the place as his residence, and that he was induced to consider the contract as abandoned. A specific performance was however decreed.

But if a purchaser object to the title, and declare he will not complete the contract, and the vendor acquiesce in this declaration, he cannot afterwards clear up the objections to his title, and compel the purchaser to perform the agreement. This was decided in the case of *Guest v. Homfray*(y). The purchaser took objections to the title, and was informed that no better title could be made; whereupon he said, he would not proceed in the purchase, and afterwards returned the abstract, at the desire of the vendor, at the same time acquainting him (the vendor) that he (the purchaser) still considered the contract was at an end. In about eight months after this the abstract was returned, with the objections answered, (*)and the bill was filed upon the defendant refusing to complete the contract. But the bill was dismissed, although it was clear that the purchaser had almost all the time wished to be off the bargain. Lord Alvanley, then Master of the Rolls, said, they should have cautioned the purchaser, and told him they were going on to make out a title. If they had done all that, and shown a probable ground to the purchaser that they might make a good

(y) 5 Ves. jun. 818.

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title, Lord Alvanley said, he should perhaps not have thought a year too long.

In *Watson v. Reid*(*z*), the contract was in June 1826. An abstract was delivered, and a correspondence took place with respect to the title. On the 7th April 1827 the purchaser gave notice that he objected to the title, and abandoned the contract; and on the 1st May he demanded a return of the deposit. The seller refused to return it; and on the 25th April 1828 filed a bill for a specific performance, and the Master of the Rolls dismissed it with costs, upon the ground of unreasonable delay in filing it.

Where circumstances are such that the purchase-money cannot be paid for a length of time, as if the purchaser die, or become bankrupt before the contract be carried into effect, and his executors, or assignees, are not able to get in the assets or effects, the vendor is entitled to require the contract to be rescinded, and he will be allowed his costs(*a*); or he may demand a specific performance; and if the defendants are unable or unwilling to perform the contract, that the estates may be resold; and if the purchase-money arising by the resale, together with the deposit, shall not amount to the purchase-money, (*)that the defendant may pay the deficiency.—A bill for the latter purposes was filed by a vendor against the assignees of a bankrupt, and a decree was made for resale. The deficiency upon that resale was 5,016*l.*; and the cause coming on for further directions, Lord Rosslyn directed that sum to be proved under the commission; saying, the whole purchase-money was the debt, and the vendor had a lien on the estate(*b*); which proving by

(*z*) 1 Russ. & Myl. 236.

(*a*) *Mackreth v. Marlar*, 1 Cox, 259; Cox's n.(1) to 2 P. Wms. 67; *Whittaker v. Whittaker*, 4 Bro. C. C. 31. See *Sir James Lowther v. Lady Andover*, 1 Bro. C. C. 396; *Dickenson v. Heron*, *infra*, ch. 10.

(*b*) *Vide supra*, ch. 1.

the resale deficient, the residue was to be proved under the commission(c).

In *Wright v. Wellesley*(d), upon a sale it was agreed that part of the purchase-money should be secured by mortgage. There was a decree for a specific performance, and a conveyance and mortgage were directed to be executed, and further directions were reserved. The Master made his report, by which it appeared that the purchaser had made default in bringing in the proper deeds, and he found what was due, which was regularly demanded, but not paid. The plaintiff, the seller, presented a petition, which came on with the further directions, praying the sale of the property, in consequence of the purchaser's default. It was objected that this could not be done; and that at all events a supplemental bill was necessary; but the Vice-Chancellor made the order as prayed for: as the defendant had evaded the decree of the Court, he would give the relief required by the new state of circumstances, and he thought that the petition was regularly presented.

In a late case, where an estate was sold by auction, in order to pay off incumbrances, under the usual conditions, and the purchase was to be completed on the 25th of March 1805, the estate was sold for 123,000*l.* and the (*)purchaser paid only 4,000*l.* as a deposit, when he ought to have paid 24,000*l.* A short time previously to Lady-day he wrote a letter to the vendors, acknowledging his inability to pay, and requesting them to join in a resale, offering to pay any loss by the second sale. This they refused; and he not having the money ready, on the 27th of March 1805, filed a bill for a specific performance, evidently to gain time. The vendors filed a cross-bill; and afterwards the purchaser became a bankrupt,

(c) *Bowles v. Rogers*, 6 Ves. jun. 95. n.

(d) V. C. 26 Feb. 1833. MS.

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when the causes were revived. The expenses of the vendors, in payment of the auction-duty, &c. were very considerable. The cross cause came on first ; the assignees of course could not bind themselves to pay the money ; and the contract was decreed to be delivered up and cancelled, so that the vendors became entitled to the 4,000*l.* deposit(*e*).

We are now to consider whether equity will permit the parties to make time the essence of the contract.

In *Williams v. Thompson or Bonham*(*f*), the bill was to carry into execution the trusts of a will, and for a specific performance of an agreement by Bonham, to purchase a real estate of the defendants. By the agreement, dated the 9th of July 1778, it was particularly expressed, "that in case a good title to the premises, discharged from all claims and demands whatsoever, should not be made out to the satisfaction of Bonham within three years from the date thereof, the agreement thereby made, so far as concerned the purchase of the premises (for the agreement contained other stipulations), should from thenceforth become void." The defendant was always ready to have completed his purchase, but the trustees (*)under the will were incapable of making out a title without the aid of equity, and for that purpose the bill in question was filed in February 1781. The cause came to a hearing on the 29th of June 1782, when the defendant (Bonham) insisted, that the title not having been made out at the time mentioned in the agreement, he was discharged from his purchase. But Lord Thurlow was of opinion, that the time fixed by the articles for making a title to the defendant was only formal, and not of the essence of the agreement ; and, as appears by the Regis-

(*e*) *Steadman v. Lord Galloway, et à contra*, Rolls, 9th Feb. 1808.

(*f*) 4 Bro. C. C. 331, cited ; Newl. Contr. 238, stated. See the case in Reg. Lib. B. 1781, fol. 564.

trar's book, he declared, that the three years being expired was not a sufficient objection to the agreement being performed.

This case depends so much on its own complicated circumstances, as scarcely to admit of being cited as an authority which should rule any other case. I find, from the Registrar's book, that it was impossible to make a title without a decree. The agreement, which was very long and special, stated all the facts; and it was expressly stipulated, that the trustees should use their utmost endeavors to obtain a decree, and the purchaser was immediately let into possession. Now the bill was filed before the expiration of the three years, no laches was imputed to the trustees, and it did not appear that the purchaser had sustained any loss, or been put to any inconvenience. It would therefore have been a strong measure to hold, that the time was of the essence of the contract. The purchaser entered into the contract with full knowledge of all the obstacles in the way of making a title; and unless the purchase was completed, there was no mode of indemnifying the trustees for the expense incurred by the Chancery suit.

In the case of *Gregson v. Riddle*(g), which was also (*)before Lord Thurlow, the agreement was for a particular day; with a proviso, that in case the title should not be approved in two months, the agreement was to be void and of no effect. There was an outstanding legal estate, which could not be got in by that time. A bill was filed for a specific performance. The defendant resisting, a reference was directed, to see whether a good title could be made; Lord Loughborough, then Lord Commissioner, expressing an opinion that the terms of the agreement were complied with(I). The report was in favor of the

(g) 7 Vez. jun. 268, cited.

(I) The stipulation was, that in case the title should not be approved (*442)

title. The cause coming on before Lord Thurlow, the performance was still resisted. Lord Thurlow said, it had been often attempted to get rid of agreements upon this ground, but never with success. The utmost extent was to hold it evidence of a waiver of the agreement; but it never was held to make it void. Mr. Mansfield, for the defendant, said, the intention was clearly to make it void; and that it would be necessary to insert a clause, that notwithstanding the decision of the Court of Chancery, it should be void. Lord Thurlow said, such a clause might be inserted; *and the parties would be just as forward as they were then.*

On this *dictum* it must be remarked, that the case did not call for it, as the agreement appears to have been *substantially* performed within the time. And it is said, that in *Potts v. Webb*, before Lord Thurlow, it being part of the terms that the purchase should be completed by a certain time, his Lordship thought that a good reason for not decreeing a specific performance(*h*). At the same (*)time it must be admitted, that Lord Thurlow entertained a floating opinion, that time could not in general be made of the essence of the contract. It does not appear, however, that any case ever came before him in which he was called upon to decide the point, and his opinion has not been followed in subsequent cases.

For in *Lloyd v. Collet*(*i*), in which the case of *Gregon v. Riddle* was cited, Lord Chancellor Loughborough said, the conduct of the parties, inevitable accident, &c. might induce the Court to relieve; but it was a different

(*h*) 4 Bro. C. C. 330, cited.

(*i*) 4 Bro. C. C. 469; 4 Ves. jun. 689; note stated *supra*.

of by the purchaser's counsel within two months, the articles should be void. The difficulty upon the title arose upon a settlement which the seller insisted was voluntary, and not upon a mere outstanding legal estate. The *seller* insisted upon being at liberty to rescind the contract, under the clause in the articles.

thing to say the appointment of a day was to have no effect at all, and that it was not in the power of the parties to contract, that if the agreement was not executed at a particular time, the parties should be at liberty to rescind it.

And in the late case of *Seton v. Slade*(*k*), Lord Eldon said, he inclined much to think, notwithstanding what was said in *Gregson v. Riddle*, that time may be made the essence of the contract(239).

The case under consideration has been assimilated to a mortgage, where, although the parties may have expressly stipulated, that if the money be not paid at a particular time, the mortgagor shall be foreclosed, yet equity will permit him to redeem, in the same manner as if no such stipulation had been entered into. There does not appear to be any analogy between the cases. In a mortgage such a declaration is inserted by the mortgagee for his own advantage; but as the land is merely a security for the debt, equity rightly considers that a mortgagee ought only to require his principal and interest, and not to obtain (*)the estate itself, by taking advantage of the necessities of the mortgagor. Once a mortgage and always a mortgage, has therefore become a maxim; and under this axiom equity is indeed administered; the parties being put in possession of their respective rights without detriment to each other. The same reasoning seems to apply to relief against a penalty. But in an agreement for sale of an estate, where it is expressly declared that the contract shall be void if a title cannot be made by a stated time, the parties themselves have *mutually* fixed upon a time; the *bona fides* of such a transaction seems to be a bar to

(*k*) 7 Ves. jun. 265; and see *Lewis v. Lord Lechmere*, 10 Mod. 503. See also 3 Ves. jun. 693; 12 Ves. jun. 333; 13 Ves. jun. 289; 2 Mer. 140; *Levy v. Lindo*, 3 Mer. 81; *Ward v. Jeffery*, 4 Price, 294.

(239) See *Benedict v. Lynch*, 1 Johns. Ch. Rep. 374.

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the interference of a court of equity; and if the contract be vacated by virtue of the agreement, the parties will still be in the possession of their respective rights. We may therefore, perhaps, venture to assert, that if it *clearly appear to be the intention of the parties* to an agreement, that time shall be deemed of the essence of the contract, it must be so considered in equity^(l). In the late case of *Hudson v. Bartram*^(m), the Vice-Chancellor (Sir John Leach) said, that the principle was admitted now that time may be made of the essence of the contract. Why are not parties to insert such a stipulation in their contract? It is difficult to understand how the doubt arose, but it is now at an end; and in the later case of *Williams v. Edwards*, where it was stipulated by the contract that if the counsel of the purchaser should be of opinion that a marketable title could not be made by the time thereby appointed for the completion of the purchase, the agreement should be void, and delivered up to be cancelled. The counsel of the purchaser was of opinion that the seller was only tenant for life of certain shares of the estate, and a bill filed by the purchaser for a specific performance, (*)with a compensation, was dismissed with costs⁽ⁿ⁾.

It remains to observe, that *where no time is limited for the performance of the agreement*, the cases considered under the first division in this chapter will assist the student in forming a judgment in what instances equity will assist a party who has been guilty of laches, although every case of this nature must in a great measure depend upon its own particular circumstances. The cases classed under the second division apply, however, with greater

(l) See Appendix, No. 6.

(m) 12 Dec. 1818, MS.; S. C. 3 Madd. 440; and see *Boehm v. Wood*, 1 Jac. & Walk. 419.

(n) *Williams v. Edwards*, 2 Sim. 78.

force to cases where no time is limited than to those where a day is fixed, for in the former cases, the Court has not to struggle against an express stipulation of the parties.

A case came before the Lords Commissioners in 1792^(o), where no time was limited for performing the agreement. The plaintiff was one of two devisees in trust to sell, and pay debts, and had alone sold the estate^(I), and entered into articles with the defendant. The co-trustee afterwards refused to join ; and there was a mortgagee who refused to be paid off. Neither of these circumstances was disclosed to the purchaser, and upon this delay in the title he proceeded to bring his action against the vendor for a breach of the agreement. The plaintiff brought his bill to compel a specific performance, and to have the co-trustee join ; and the mortgage redeemed, and to stay the action. The defendant suffered an injunction to go against him for want of an answer ; and having afterwards answered, a motion was made to dissolve the injunction ; and the (*)cause shown by the plaintiff was, the possibility of making a good title by this very suit. The Court held the purchaser bound, and continued the injunction.

In this case it appears from the Registrar's book, that the purchaser insisted on his purchase, and that the injunction should be dissolved ; which was certainly a very important feature in the cause. It was not the case of a man merely seeking to recover his deposit. It must, however, be repeated, that it is impossible to lay down any general rule applicable to cases where no time is appointed for performing the agreement. Indeed, throughout this chapter, it has been found impossible to treat the subject of it in an elementary manner.

(o) *Tyrer v. Artingstall*, Newl. Contr. 236. See the case in Reg. Lib. B. 1792, fo. 28, nom. *Tyrer v. Bailey*.

(I) The estate was sold by auction *with the concurrence of the other trustee*. The plaintiff, however, alone signed the agreement.

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(*)CHAPTER IX.

OF THE ABSTRACT AND CONVEYANCE: THE ASSIGNMENTS OF TERMS, ATTESTED COPIES AND COVENANTS FOR TITLE, TO WHICH A PURCHASER IS ENTITLED: OF SEARCHING FOR INCUMBRANCES: AND OF RELIEF IN RESPECT OF INCUMBRANCES.



SECTION I.

Of the Abstract and Conveyance.



THE vendor must at his own expense furnish the purchaser with an *abstract* of his muniments(I), and deduce a clear title to the estate. The abstract ought to mention every incumbrance whatever affecting the estate, and should, therefore, contain an account of every judgment by which it is affected(*a*); but equity considers it complete whenever it appears, that upon certain acts done, the legal and equitable estates will be in the purchaser; which may be long before the title can be completed(*b*). Although the estate is sold free from incumbrances, and the abstract shows an amount of incumbrance exceeding

(*a*) *Richards v. Barton*, 1 Esp. Ca. 268.

(*b*) See 8 Ves. jun. 436; and 1 Jac. & Walk. 421.

(I) Formerly the title-deeds themselves were delivered to the purchaser, and his solicitor prepared the abstract at his expense; and the abstract was compared with the title deeds by the counsel before whom it was laid. See *Temple v. Brown*, 6 Taunt. 60.

the purchase-money, yet it must be considered that the seller can make a good title(c). This rule is properly (*)confined to cases where the seller, and persons who are trustees for him, can make a title; for if the concurrence of a stranger is necessary, and he is not bound to join, the abstract cannot be deemed perfect until it shows that he has given perfection to the title(d).

The abstract is delivered for the following purposes: 1st, That the purchaser may see whether the title is such as he will accept. He has also a right to it after he has taken an opinion, in order to take another opinion in case he is not satisfied with that, and for the purpose of taking further objections, and of further considering the title. He must have it too for another purpose, to assist him in preparing his conveyance, that he may see who must be made parties, what form of conveyance is expedient, what parcels are to be inserted, and the like(e). As to the general property in the abstract, it is hard to say who may have it; while the contract is open, it is neither in the vendor nor in the vendee absolutely; but if the sale goes on, it is the property of the vendee; if the sale is broken off, it is the property of the vendor. In the mean time the vendee has a temporary property, and a right to keep it, even if the title be rejected, until the dispute be finally settled, for his own justification, in order to show on what ground he did reject the title(f). If the purchase go off, not only is the abstract to be returned, but no copy to be kept, lest it should be used for a mischievous purpose(g); and although the purchaser pays for the opi-

(c) *Townsend v. Champernown*, 1 You. & Jerv. 449.

(d) *Lewin v. Guest*, 1 Russ. 325.

(e) See 2 Taunt. 276, *per* Mansfield, C. J.

(f) 2 Taunt. 278, *per* Chambre, J.

(g) 2 Taunt. 277, *per* Lawrence, J.

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nion, yet, for the same reason, that ought, it should seem, to be returned with the abstract(*h*).

In a case where the purchaser returned the abstract to (*)the seller, to answer the queries and opinion of counsel, it was held, that he (the purchaser) might maintain trover against the seller for the abstract, although the seller himself might ultimately be entitled to the abstract. The temporary property of the purchaser in the abstract was sufficient to enable him to maintain the action(*i*).

The seller is bound to produce the deeds, in order that the abstract may be examined with them, although they are not in his possession, and the purchaser is not to be entitled to the custody of them. But, if they are in the possession of a third person, the purchaser's solicitor, it seems, must send to the place where the deeds are, in order to examine them with the abstract, and the seller must pay the expense of the journey(*j*)(I).

The strict rule seems to be, that the vendor must procure the fee to be vested either in himself, or a trustee for him; and that a purchaser is not compellable to bear the expense of a long conveyance, on account of the legal

(*h*) See and consider 2 Taunt. 270, *per* Mansfield, C. J.

(*i*) *Roberts v. Wyatt*, 2 Taunt. 268.

(*j*) *Sharp v. Page*, Rolls, 1815, MS.

(I) Sale by assignees of a bankrupt. A settlement of 1763 was in the possession of a former purchaser, and there was only a covenant to produce a copy of it. A bill was filed by the assignees for a specific performance. The purchaser was informed that the settlement was in the possession of a gentleman in the country, *and might be seen there*. He was ready to covenant to produce it. The purchaser submitted to the Master that it was the duty of the sellers to produce the deeds stated in the abstract before the Master, or to the purchaser's solicitor in London. The Master stated, that he would make inquiry of conveyancers, what the practice in such cases was, and afterwards decided, that the purchaser's solicitor ought to send to Baldock, where the deeds were, to compare the abstract with the settlement, but that the sellers ought to pay the expenses of such journey.

estate having been outstanding for a length of time, or of the estate being subject to incumbrances which are to be paid off(*k*). It is not, however, very usual to insist upon (*)this, unless the title cannot be perfected without a private act of parliament; in which case, the expense of obtaining it is always borne by the vendor.

Unless there be an express stipulation to the contrary, the expense of the conveyance falls on the purchaser(*l*); who, as we have already seen, must in that case prepare and tender the conveyance(*m*). The expense attending the *execution* of the conveyance is, however, always borne by the vendor, but of course he does not pay the costs of the purchaser's attorney.

If the estate be copyhold, the purchaser must bear the expense both of the surrender to him and of his admission(*n*); and a vendor is not obliged to pay the fine due on the *admission* of the vendee, although he covenant to surrender and assure the copyholds at his own costs and charges(*o*); because, it is said, the title is perfected by the admittance, and the fine is not due till after(*p*).

If a draft be altered by either party, although the alteration be such as would be supported by the Courts, yet the draft as altered should not be ingrossed without a communication being first made to the other party(*q*).

(*k*) See 1 H. Blackst. 280.

(*l*) See 2 Ves. jun. 155; and *note*, this is the universal practice of the Profession.

(*m*) *Supra*, ch. 4.

(*n*) *Drury v. Man*, 1 Atk. 95, Sanders's edition.

(*o*) *Graham v. Sime*, 1 East, 632.

(*p*) *Dalton v. Hammond*, 4 Co. 28 a; *Rex v. Lord of the Manor of Hendon*, 2 Term Rep. 484; and see *Fishe v. Rogers*, 1 Rol. Abr. 506, (A.) pl. 1; 3 Burr. 1543; Lex. Cust. p. 163; Wood's Inst. p. 137; Gilb. Ten. 205; 1 Watk. Copy. 286; *sed qu.* and see *Dalton v. Hammond*, Cro. Eliz. 779; Mo. 622, pl. 851; and supp. to Co. Copy. s. 10; and *Parkins v. Titus*, MS.

(*q*) See *Staines v. Morris*, 1 Ves. & Bea. 15.

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A purchaser has a right to require the vendor himself to surrender the estate, if copyhold, and to execute the conveyance, if freehold; and he cannot be compelled to accept either a surrender or conveyance, under a power (*) of attorney, unless an actual necessity appears for it(r); for it tends to multiply his proofs, and he may be put under difficulties by these means; the letter of attorney may be lost, and the party is obliged to prove the execution of it(s). A letter of attorney may be revoked the next moment, that revocation may be notified to the attorney without the purchaser's knowledge, and then the conveyance would be void; and the purchaser's only remedy would be a suit in equity(t). This was said by Lord Hardwicke, but the doctrine of later times is, that a power of attorney given for valuable consideration cannot be revoked(u).

A further objection is, that the vendor may be dead at the time the power is exercised, and in that case the execution would be void, as a power of this nature expires by the death of the principal(w)(241). For this reason, where a purchaser chooses to permit the conveyance to be executed by attorney, the attorney should execute a declaration of trust, that he will stand possessed of the purchase-money in trust for the purchaser, until it either appear by satisfactory evidence, that the vendor was alive at the time of the execution of the deed, or if he shall be dead, until the estate is duly conveyed to the purchaser.

(r) *Mitchel v. Neale*, 2 Ves. 679; *Richards v. Barton*, 1 Esp. Ca. 268; and see *ibid.* 115; *Noel v. Weston*, 6 Madd. 50.

(s) See *Johnson v. Mason*, 1 Esp. Ca. 89.

(t) *Per* Lord Hardwicke, in *casu Mitchel v. Neale*, *ubi sup.*

(u) *Walsh v. Whitcomb*, 2 Esp. Ca. 565.

(w) *Shipman v. Thompson*, *Wynne v. Thomas*, Willes, 105, 565; *Wallace v. Cooke*, 5 Esp. Ca. 117.

(241) The grantor of land is presumed to be alive until the contrary is shewn. *Battin's Les. v. Bigelow*, 1 Peter's Rep. 452.

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As a purchaser cannot be required to take a conveyance executed by attorney, so, on the other hand, if a vendor only covenant to surrender or convey lands to a purchaser upon request, he is not compellable to appoint an attorney for that purpose(*x*).

(*) Where the estate lies in a register county, the conveyance should be registered as soon as it is executed. Mr. Hilliard remarks(*y*) that, by the statutes for registry, there is no time limited for registering deeds; and that it is therefore obvious from an inspection of the acts, how necessary it is, *that deeds should be registered immediately on their being executed*: to enforce this the more strongly, he adds, it may not be useless to consider, if a subsequent conveyance or mortgage should be executed for a valuable consideration, and from an almost momentary inattention or delay of the first vendee or mortgagee, in not immediately registering, the second vendee or mortgagee should register first; whether, in such case, the first vendee or mortgagee doth not thereby become in a worse situation than he would have been by law, in case the registering acts had not been made.

It is clear that, in the case put, the subsequent purchaser or mortgagee, unless he had notice, would prevail over the first vendee or mortgagee. And it must be remarked, that, by delaying to register his conveyance, a purchaser gives a prior incumbrancer, who may have neglected to register his incumbrance, an opportunity of retrieving his error, and thereby establishing his demand on the estate; for the acts only say that deeds shall be void, *unless* such memorial thereof is registered, as by the acts is directed, *before the registering the memorial under which the subsequent purchaser claims*(*z*).

It appears, therefore, that there are two cogent reasons

(*x*) *Symms v. Lady Smith*, Cro. Car. 299; Godb. 445.

(*y*) N. (2) to Shep. Touch. 116.

(*z*) *Vide infra* in this chapter, and chapter 16.

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why a memorial of the conveyance should be duly registered *immediately* after the execution of the conveyance; the one, that a prior incumbrancer might, during the delay, register his incumbrance; the other, that the delay (*) might give an unprincipled vendor an opportunity of selling the estate to a *bona fide* vendee without notice; who, if he registered his deeds before the registry of the first conveyance, would certainly prevail against the first purchaser.



SECTION II.

Of Assignments of Terms.

A PURCHASER may require an assignment of all outstanding terms, of which he could avail himself in ejectment, to attend the inheritance; and if the purchaser leave them outstanding, he may not, perhaps, have the full enjoyment of his estate without, at some future period, being himself at the expense of getting them in: for even a mortgagee would be very unwilling to advance money on the estate, unless the terms were assigned, lest a subsequent mortgagee or purchaser, without notice, should obtain an assignment of them, and so overreach the prior mortgage.

I. The position that a purchaser may require an assignment of all outstanding terms, *of which he can avail himself in ejectment*, to attend the inheritance, naturally calls our attention to the cases in which a term may be used upon an ejectment. We have already seen that, in some cases, the possession of the *cestui que trust* may operate

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as a bar to his trustee(*a*). So where whilst fines could be levied a purchaser was not, at the time of his contract, aware of the term, and its existence would have endangered or affected his title, a fine levied, with five years (*)non-claim, would have operated as a bar to the trustee of the term(*b*); although where the term had been assigned in trust for the purchaser, a fine levied would not affect it, because such a construction would be manifestly contrary to the intention of the parties(*c*). But as the law on these points was not well settled, it was laid down in the last edition of this work, as a general rule, that nearly all terms for years, however ancient, and notwithstanding any adverse possession or fines, might be required by a purchaser to be assigned to attend the inheritance; and where a term had once been assigned to attend the inheritance, although at a period very remote, and it had been since treated as a subsisting term by declarations in the subsequent deeds, that the person in whom it was vested should stand possessed of it in trust to attend the inheritance, a purchaser could not be advised to permit the term to continue outstanding, because it was clear that it might be used against him upon an ejectment. Nor was it any answer to a purchaser's claim, that the term has already been recently assigned to attend the inheritance. And the same rule should still be acted upon although fines are abolished, and the time of limitation is shortened by the late acts.

Where terms for years are raised by settlements, it is usual to introduce a proviso, that they shall cease when the trusts are at an end. In well-drawn deeds, this proviso always expresses three events: 1st, the trusts never

(*a*) *Supra*, p. 394.

(*b*) *Iseham v. Morrice*, Cro. Car. 109, 5th resol.; 2 Ventr. 329.

(*c*) *Freeman v. Barnes*, 1 Ventr. 80; 1 Lev. 270. See *Smith v. Peirce*, Carth. 100; *Basket v. Peirce*, 4 Vern. 226.

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arising ; 2dly, their becoming unnecessary or incapable of taking effect ; or, 3dly, the performance of them. But it frequently happens, in ill-penned instruments, that these events are not accurately expressed, or not all provided for ; and in those cases it must be seen whether, in the (*)events which have happened, the term has ceased, for if it has not, the purchaser must require an assignment of the term. To illustrate this doctrine, let us suppose a term for years to be created for raising a sum of money for the first son of *A.* who shall attain twenty-one, and that it is declared by the deed, that when the trusts are performed, the term shall cease. Now, in this case, if *A.* should not have a son who attains twenty-one, the trusts would not have arisen, and consequently could not be performed ; and it seems that the term will not cease ; the event which happened not being provided for in the declaration for cesser of the term.

In a late case(*d*), which has already been referred to, it appeared, that under a power Mr. Walsh Porter had, by deed, charged the estate in question with the payment of 5,000*l.* to the children of his then intended marriage, at such time or times, and in such proportions, and in such manner as thereafter mentioned. And, by the same deed, in further exercise of his power, he appointed the estate to trustees for five hundred years, upon the usual trusts to raise the 5,000*l.* payable to sons at twenty-one, and daughters at twenty-one, or marriage, with the usual provision for raising maintenance in the mean time. And it was provided, that if no child should become entitled to the portions, or if the person or persons to whom the next estate of inheritance of and in the said manor, &c. in reversion or remainder, expectant on the determination of the said term of five hundred years, shall, for the time being, belong, do, and shall well and truly pay, or cause to be

(*d*) *Hays v. Bailey*, Rolls, 10th August 1813, *vide supra*, p. 345.

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paid, unto the said Edinund Lambert and Thomas Gorman (the trustees of the term), or the survivor of them, or the executors or administrators of such survivor, or well and sufficiently, to his and their good liking, secure to be paid (*)the portion or portions hereinbefore provided, or intended to be provided, for such child or children, or so much thereof as shall be remaining unpaid (all such maintenance and interest as is hereinbefore mentioned being first raised and satisfied); and in case all and every of the trusts declared as aforesaid, of and concerning the said term, shall in all things be performed and satisfied, or shall be discharged, either by becoming incapable of being performed, or by any other means, and the trustees shall be paid their expenses, then the term should cease. The portions were paid to the personal representatives of the surviving trustee, with all interest and maintenance money up to the day of payment, by the reversioner, "in order," as it was declared, "to discharge the estates from the portions, and that the term might cease by virtue of the proviso contained in the deed of appointment;" and a regular release was executed by the trustees of the term upon receipt of the money. The estate was sold, and the purchase completed. The purchaser sold again; and it appeared, that one of the children was still under age; and it was insisted that the payment to the trustees did not discharge the estate from the portions. The seller filed a bill for a specific performance. It was argued, that the term in the event had ceased; but the Master of the Rolls (Sir William Grant) suggested, that, although the term might have ceased, yet the portions would still remain charged on the estate under the charge in the deed. It was, however, submitted, that the charge, and the term, and the trusts of it, must all be taken together. The portions would have been as much a charge on the estate under the trust of the term as they were under the express charge. If the term, which was the legal and substantial

security, was gone at law, it was impossible for equity to say that the charge yet subsisted. The very intention of the parties would be frustrated by such a decision. The (*)portions were to be paid, according to the charge, to the children in the manner after mentioned ; and one mode afterwards mentioned was a payment to the children through the medium of the trustees. The proviso was inserted to meet the very case which happened. The trustees were persons in whom the party making the charge reposed confidence ; and he, the creator of the trust, had expressly provided, that if the reversioner should be desirous to discharge the estate *before the children were capable of receiving the portions* (for, if they were of age, the portions would, of course, be payable to themselves), he might pay the money to the trustees for them, or even secure it to the good liking of the trustees. Equity had no power to say that this was not a discreet act, and that the portions, although paid to the trustees precisely as directed by the deed, should, for the greater security of the infants, still remain charged on the estates. The term had unquestionably ceased at law ; and the portions which it was raised to secure, had, of course, ceased with it. In support of the objection, it was argued, that the portions were not payable by the charge till the children attained twenty-one, and that they could not before that period be paid to the trustees, so as to discharge the estate from them. The Master of the Rolls said, that he was inclined to be of opinion, that the charge would run with the term which would regulate the mode of payment ; but he doubted whether the term would cease, for it was required, that “all such maintenance and interest should be first raised and satisfied.” Now maintenance was to be raised till the children attained twenty-one. Then how can it be said that that is done until the child attained twenty-one ? That circumstance must concur ; all the trusts must be performed ; it is in the conjunctive. His

Honor doubted therefore whether the charge would cease. Under these circumstances, he should think that (*)the purchaser would not be forced to take the title ; and therefore he overruled the exception to the Master's report against the title.

This objection was not considered in the argument. It might, had the point been made, have been insisted, that the direction in the deed, that "all such maintenance and interest being first raised and satisfied," must be confined to maintenance and interest up to the time of payment of the principal. The interest was the fruit of the principal ; and when the principal was paid, it would yield interest, and that would, of course, be the fund for maintenance. The ground taken against the title makes the reversioner still liable to pay interest under the charge in the deed, although he has paid off the principal, which will produce interest. Could he file a bill against the trustees to pay him the interest of the 5,000*l.* which he paid to them ? Could the trustees file a bill against the owner of the estate for payment of the interest, although they had the 5,000*l.* in the funds ? And, if not, does it not follow that the interest was no longer a charge on the estate ? The construction, which depends on the general expression in the deed, wholly defeats the intention of the parties, that the reversioner might, at any time, relieve the estate from the charge altogether, upon payment of the portions. The power supposed to be reserved to the owner is, to pay off the principal, and yet leave the estate subject to the interest. The decision, in this case, proves, that the charge of the interest is as serious an objection to the owner's title as the charge of the principal. If, therefore, the payment of the principal has any operation, it is to make the owner pay ten per cent. interest instead of five. But, it is admitted, that the portions might be paid to the trustees before the children attained twenty-one. Now, as the maintenance and interest were to be *first* raised

and paid, it must necessarily be intended, that the maintenance (*) was such as had already accrued ; for, how could the trustees raise by anticipation what might never become due ? The proviso for cesser embraced, 1st, the event of there being no child who should become entitled to the portion ; 2d, the payment of the portions to the trustees ; 3d, the performance of the trusts. There are some general words in the proviso which are unskilfully introduced ; but this was the intention, and the words are sufficient to effectuate it. The word *and*, introducing the third event, must, it is submitted, be read *or* ; for the second and third events could not happen together. The case was afterwards heard upon appeal before the Lord Chancellor, but it had become unnecessary to decide the above point, and he gave no opinion upon it.

Where a portion is secured by a term of years, and the term is directed to cease upon payment of the money, and the estate is sold before the portion is paid, it sometimes happens that the purchaser is desirous to keep the term on foot, and the following plan has been adopted for that purpose.—A fictitious mortgage is first made of the term for raising the portion, to a friend of the purchaser's, in which the purchase is not noticed ; then the estate is conveyed to the purchaser in the usual way, subject to the mortgage ; and then, by a subsequent deed, the supposed mortgagee declares that he has been paid off, and that he will stand possessed of the term in trust for the purchaser, and to attend the inheritance. Now, this plan, although certainly ingenious, is, I fear, ineffectual. It is impossible to read the deeds bearing date, as they necessarily must do, within a day or two of each other, without seeing that the whole proceeding is fictitious ; and if the term should be set up in ejectment, it would be quite open to the adverse party to insist that the deeds were nugatory. And when the fact is once established, that

(*)the portion was paid off without a *bona fide* mortgage, it should seem that the term must cease, by force of the proviso in the deed creating it, and that no artifice of the parties can keep it alive.

II. We may now consider shortly the leading rules on the doctrine of merger of terms of years, without a knowledge of which the practical conveyancer must frequently be at a loss to know of what terms to require an assignment.

Where a term of years and the inheritance meet in one person in the same right, the term is extinct.

So a man cannot, Sir Edward Coke says, have a term for years in his own right, and a freehold in *auter droit*, to consist together(*e*); and he illustrates this rule by stating, that where a man, lessee for years, takes a feme lessor to wife, the term is extinct. But this position appears to be contradicted by the case of *Lichden v. Winsmore*(*f*), in which it was held, that if there be lessee for years, reversion for life to *A.*, a married woman, and the lessee grant his estate to the husband, and then the wife dies, the term is not extinct, because the husband has the estates in several rights, for the freehold was in the wife, and the husband was merely seised in her right; or, to speak more correctly, the freehold was in the husband and wife, although in her right(*g*).

And it is clear, that if in a case like this, the coalition be not occasioned by the act of the termor, the term will not merge. Thus, the descent of the fee upon the wife of a termor for years after the intermarriage will not drown (*)the term, because the estates do not coalesce by the act

(*e*) 1 Inst. 338 b. See 9 East, 372.

(*f*) 2 Roll. Rep. 472; 1 Ro. Abr. 934, pl. 10; Ben. 141; and see *Thorn v. Newman*, 3 Swanst. 603.

(*g*) See *Polyblank v. Hawkins*, Dougk. 329.

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of the termor for years(*h*), and the term he holds in his own right, and the freehold in right of his wife. This was decided in the reign of James 1. by Fleming, C. J. and Fenner and Croke, Justices, against the opinion of Williams, Justice, who, even after judgment was given, said to the counsel at the bar that, as clear as it was that they were at the bar, so clear it was that the term was extinct; and in other respects expressed himself very violently, so that Sir Edward Coke's doctrine was not overruled without opposition.

Where, however, a husband termor for years, seised of the freehold in right of his wife, has issue by the wife, so that he is entitled, in his own right, as tenant by the curtesy, there seems reason to contend that the term will merge(*i*).

A term vested in a person as executor *may* belong to him beneficially; and it therefore seems, that if he purchase the reversion, the term will be extinct; although it is usual in practice to require an assignment of such a term on a future purchase of the inheritance; and this practice is sanctioned by an *obiter dictum* of Lord C. J. Holt's in *Cage v. Acton*(*k*), where he admitted (as a point perfectly clear) that if a man hath a term as executor, and purchases the reversion, this is no extinguishment. But in Brooke's Abridgment, it is in three several places(*l*) stated to have been held by the Judges Hales and Whorwood, in 4 Edw. 6, that if a man has a lease for years as executor, and afterwards purchases the land in fee, the (*)lease is extinct; and this position is cited and not de-

(*h*) *Lady Platt v. Sleaf*, Cro. Jac. 275; 1 Bulst. 118; Jenk. 2d Cent. pl. 38.

(*i*) See 1 Bulstr. 118.

(*k*) 1 Salk. 326; Com. 69; and see *Webb v. Russell*, 3 Term Rep. 393.

(*l*) Bro. Abr. Extinguishment, 54, Leases, 63, Surrender, 52.

nied in several cases(*m*), and is adopted by Rolle in his Abridgment(*n*). So in a case in Leonard(*o*), Dyer explicitly laid down the same doctrine; and it has been treated as clear law in two cases, one of which is reported by Hetly(*p*), and the other by Freeman(*q*). And in one case one of the Judges thought, that even the descent of the fee on the executor would merge the term(*r*), although Lord Chief Baron Gilbert justly questions this position(*s*). The rule, that a purchase of the fee by the executor shall merge the term, appears to be founded in reason as well as upon authority; for, as far as his own interest is concerned, there cannot be any reason why the term should not merge. It is admitted, however, on all hands, that the term shall not be extinct as to creditors, and this I am induced to believe, from Lord Raymond's report of *Cage v. Acton*, is all that Lord Chief Justice Holt meant(*t*), although his *dictum* is so generally stated in Comyns's and Salkeld's reports of this case. At any rate, it was an *obiter dictum*, and cannot affect a doctrine apparently so well established; and it is therefore submitted to the reader, that in a case of this nature the term must merge in the inheritance, except as to creditors.

But a man may have a freehold in his own right, and a term in *auter droit*(*u*).

Therefore, if a man seised of the freehold intermarry with a woman termor for years, the term is not extinct, but the husband is possessed of the term in right of his (*)wife, during the coverture, because he has not done

(*m*) 3 Léo. 111; 2 Rolle's Rep. 472.

(*n*) 1 Ro. Abr. 934, pl. 9.

(*o*) 4 Leo. 37, pl. 102.

(*p*) Het. 36.

(*q*) 1 Freem. 289, pl. 338.

(*r*) See 3 Leo. 112.

(*s*) See Bac. Abr. Leases, (R.)

(*t*) 1 Lord Raym. 520.

(*u*) 1 Inst. 338 b.

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any act to destroy the term, and it is cast upon him by the act of law(*x*).

So if the lessee grant the term to the wife of the lessor, it will not merge(*y*).

But if a man possessed of a term in right of his wife, purchase the freehold, there seems ground to contend, that the term will merge, inasmuch as the estates coalesce by his own act, and not as in the case of marriage, by the act of law; and accordingly in one case(*z*), Dyer held the wife's term to be extinct by the husband purchasing the fee; and Manwood, C. B. agreed with him; and the same doctrine appears to have been held in a case reported by Moore(*a*). Lord C. J. Hobart, however, seems to have been of opinion, that a purchase by the husband of the fee should not extinguish the term(*b*), and in this opinion Lord C. J. Holt appears to have coincided(*c*).

Upon the foregoing principle, if the lessee make the freeholder his executor, the term will not merge(*d*).

It was formerly holden, that a term for years could not merge in a term for years; but in *Hughes v. Robotham*(*e*), it was determined, that if there be two termors, he who has the less estate may surrender to the other, and the term will merge in the greater: 2dly, that although the reversion be for a less number of years than the term in possession, yet the term in possession shall drown in that in reversion.

(*x*) *Bracebridge v. Cook*, Plo. Comm. 417; and see 4 Leo. 38; Godb. 2; Het. 36.

(*y*) *Bracebridge v. Cook*, Plo. Comm. 417.

(*z*) Godb. 2; 4 Leo. 38.

(*a*) Mo. 54, pl. 157.

(*b*) *Young v. Radford*, Hob. 3.

(*c*) See 1 Salk. 326.

(*d*) 1 Inst. 338 b; 1 Freem. 289, pl. 338. See *Attorney-general v. Sands*, 3 Cha. Rep. 19.

(*e*) *Hughes v. Robotham*, Cro. Eliz. 302. See Bac. Abr. Leases, (S.) s. 2; *Stephens v. Brydges*, V. C. 1821, MS. accordingly.

(*)It remains to observe, that before the statute of uses(*f*), if a termor for years was enfeoffed to uses, equity would not compel him to execute the estate so as to deprive himself of his term. The statute of Henry, by transferring the use into a possession, would have destroyed the estates of termors who were enfeoffed to uses; but to prevent this injustice, an express saving was introduced into the act of the rights of all persons seised to uses. Therefore, if a fine or feoffment be levied or made to a lessee for years to the use of others, the term will not be extinct, although if the statute had not been made, the term would have been extinguished at common law(*g*). So, where a termor for years was made a tenant to the *præcipe*, it was held that although the freehold vested in him drowned the term until the recovery was suffered, yet, when the recovery was perfected, the term should revive(*h*). And it seems that the same rule must prevail where the conveyance is by lease and release, although it has been strenuously argued, that as the lease for a year is a surrender in law of the prior term, the subsequent release to uses shall not bring the case within the saving of the statute of uses. There appears, however, to be no weight in this argument; a lease and release being a common conveyance, and deemed one assurance; and from one report of the case, in which the question arose, it seems that the Judges(*i*) thought that the term was not extinguished by the lease for a year(*k*).

It may here be remarked, that a deed purporting to be an assignment of an old term may, if that term has by

(*f*) 27 Hen. VIII. c. 10, s. 3.

(*g*) Chesney's case, Mo. 196, pl. 345; 7 Rep. 19 b, 20 a, cited.

(*h*) Ferrors v. Fermor, 2 Roll. Rep. 245; Cro. Jac. 643; Terrie's case, 1 Ventr. 280, cited.

(*i*) See 3 Keb. 310.

(*k*) Fountain v. Cook, 1 Mod. 127; best reported Bac. Abr. Leases, (R.); S. C. by the name of How v. Stiles, 3 Keb. 283, 309; 2 Lev. 126.

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(*)any accident ceased, operate as the creation of a new one. As in the common case of an assignment of a term in which the freeholder in reversion joins in granting, bargaining, selling, and assigning the term; if the old term has become void, it will be resuscitated by these words(*l*).

III. The expense of the assignment of any terms of years which a purchaser can require to be assigned to attend the inheritance, must be borne by the purchaser himself, but the title to them must of course be deduced at the expense of the vendor; and if a term has never been assigned to attend the inheritance, the vendor must bear the expense, not only of deducing the title, but also of the assignment of the term to a trustee of the purchaser's nomination to attend the inheritance.

The rule, that terms of years which have never been assigned to attend the inheritance, must be assigned to a trustee of the purchaser's nomination, *at the vendor's expense*, is not acknowledged by some gentlemen of eminence, who, on the contrary, insist that the purchaser must consider the term either as a protection, or as an incumbrance. If he deem it a protection, then they contend that he must assign it at his own expense. If, on the contrary, the purchaser treat the term as an incumbrance, they admit that the vendor must discharge the estate from it, and accordingly offer to merge the term at his expense. The general practice of the Profession, however, is certainly in favor of the purchaser's right to require an assignment of the term to attend the inheritance at the vendor's expense; and when it is admitted that the vendor may be compelled to merge the term at his own expense, it seems very difficult to contend that (*)the purchaser may not insist upon its being assigned.

(*l*) See *Denn v. Kemeys*, 9 East, 366.

A refusal to *assign* may, under these circumstances, be thought to be a mere subterfuge to avoid the expense of the assignment, and throw it upon the purchaser. If the purchaser insist upon an assignment of the term, it seems clear that the vendor cannot safely merge it, although the purchaser refuse to bear the expense of the assignment. The title appearing on the abstract is that on which the purchaser is to act, and consequently the vendor, after delivery of the abstract, ought not merely of his own authority to do any act to alter or affect the title ; and a trustee of a term can scarcely be advised, after notice of a contract for sale of the estate (when he is by construction of equity become a trustee for the purchaser), to merge the term against the consent of his *cestui que trust*, the purchaser. It would be difficult, therefore, to establish any other rule than that which, it is apprehended, is generally adopted by the Profession.

In some cases, perhaps, assignments of terms may be dispensed with.

In *Willoughby v. Willoughby*(*m*), Lord Hardwicke laid it down, “that where an old term had been assigned upon an express trust to attend upon and protect the inheritance, *as settled by such a deed*, or the uses of *such a settlement* described or referred to particularly, as it sometimes happens, and the conveyancer is satisfied that those uses of the inheritance have never been barred till his new settlement or purchase is made, he may very safely rely upon it, because the very assignment carries notice of the old uses(*I*). Nay, where the assignment has (*)been generally in trust to attend the inheritance, and

(*m*) 1 Term Rep. 763.

(*I*) *Qu.* this. If the person claiming under the settlement should sell the estate to two distinct purchasers, who were equally innocent, it seems that the second purchaser, by procuring an assignment of the term, might exclude the first purchaser during the term.

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the parties approve of the old trustees, they may safely rely upon it, especially in the cases of a purchase or mortgage, where, the title-deeds always are or ought to be taken in : for if he has the creation and the assignment of the term in his own hands, no use can be made of it against him. This, however, is never relied upon in practice. And a declaration of trust of a term never should be relied upon, unless all the title-deeds are delivered to the purchaser. A mere declaration of trust will not protect the possession against a subsequent purchaser *bona fide*, and without notice, who procures an assignment of the term ; and it has even been held that the custody of the deeds, accompanied by a declaration of trust of the term, is, as against a bare declaration of trust, tantamount to an actual assignment (*n*). But, as we shall presently see, a case may perhaps occur, in which an assignment of a term would be a protection against a declaration of trust of it, accompanied by the deeds ; so that a prudent purchaser will scarcely ever dispense with an actual assignment of an outstanding term(242).

Mr. Butler, in his learned and practical notes to Co. Litt. lays down the following rules respecting the cases in which a purchaser should or should not dispense with an assignment of outstanding terms(*o*).

“ 1st. It may be laid down as a general rule, that wherever a term has been raised for securing the payment of money, as the assignment of it by the trustee for the

(*n*) Stanhope v. Earl Verney, Butler's n. (1) s. 13, to Co. Litt. 290. b.

(*o*) See the 13th section of n. (1) to 1 Inst. 290 b.

(242) Of two equitable incumbrancers, he who has the preferable right to call for the legal estate, is entitled to preference ; though he hath not actually got it in, nor got an assignment, nor even possession of the deed conveying the outstanding legal title ; and though his lien is of subsequent date to the other incumbrance. *Williamson v. Gordon's Exrs.* 5 Munf. 257.

person entitled to receive, to a trustee for the person obliged to pay the money, is the best possible evidence of (*)the payment of the money ; it may be reasonably required as such.

“2dly. In case a term for years has been assigned to attend the inheritance, if, upon a purchase, *all* the deeds (as well originals as counterparts) by which the term was created or assigned are delivered to the purchaser, and he is satisfied that the trustee in whom it is there said to be vested has made no prior assignment of it, and that the vendor has not charged the estate with any intermediate incumbrance, it is difficult to say what possible use can be made of the term against him, or what good can be answered by requiring an assignment of it to a trustee of his own, unless it be to satisfy the requisitions of those to whom he may afterwards have occasion to mortgage or sell the estate.

“3dly. But if any of the deeds respecting the term are not delivered to the purchaser, or if he is not satisfied of the trustee not having previously assigned it, or of the vendor having made no intermediate incumbrance, it seems prudent to require an actual assignment of it to a trustee for him.”

With respect to the second of the above rules, the attention of the purchaser should be particularly called to the requisite, that the vendor has not charged the estate with any intermediate incumbrance. A vendor may, by fraudulent representations, induce a purchaser to believe that the title-deeds are destroyed or mislaid : and if a purchaser acting under this impression should procure an actual assignment of a term from the person in whom it was vested, it seems impossible to contend that the person in possession of the deeds, although he claims a prior title to the inheritance(*p*), has any equity against

(*p*) See 1 Pow. Mort. 4th edit. 510 ; *Evans v. Bicknell*, 6 Ves. jun. 174 ; *Martinez v. Cooper*, 2 Russ. 198.

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(*)the subsequent purchaser, who must not be prevented from making the best use he can of the term. It is evident, however, that the person having thus obtained an assignment of a term, must have considerable difficulty in using it as a sword to attack the possession of his adversary(*q*).

A purchaser may, in some cases, be entitled to the benefit of an outstanding term, although he has neither an assignment of it, nor the possession of the deeds relating to it. This doctrine will be discussed hereafter(*r*).

It may here be remarked, that where a term of years does not necessarily appear on the face of the conveyance, it should be assigned to attend the inheritance by a separate deed, and no notice should be taken of it in the conveyance of the fee, for the legal estate must prevail at law(*s*)(243); and it is a consequence of this rule, that where a term of years is assigned by the conveyance of the inheritance, or even mentioned in it as a subsisting term, the owner cannot safely bring an ejectment in his own name only, lest his action should be defeated by the production of the conveyance to him, in which it would appear that the legal estate was vested in his trustee. And here we may correct the common error of excepting the

(*q*) See *ex parte* Knott, 11 Ves. jun. 609.

(*r*) See *post.* ch. 17.

(*s*) See *Doe v. Wroot*, 5 East, 132; and the cases cited in the note to p. 138; which have overruled Mr. Justice Gundry's, Lord Mansfield's and Mr. Justice Buller's equitable doctrine as to terms of years. See *Doe v. Pegge*, 1 T. Rep. 758, n. (*a*), and several cases in Burr. Cowp. and Dougl.

(243) See *Jackson v. Sisson*, 2 Johns. Cas. 321. *Jackson v. Pierce*, 2 Johns. Rep. 221. *Jackson v. Van Slyck*, 8 Johns. Rep. 380, 2d Edit. *Moore's Les. v. Pearce*, 2 Hen. & Munf. 236. See also, *Finley v. Williams*, 9 Cranch, 164. *Brown's Les. v. Galloway*, 1 Peters' Rep. 299. *Willink's Les. v. Miles*, 1 Peters' Rep. 429. *Penn's Les. v. Klyne*, 4 Dall. 409. *Jackson v. Chase*, 2 Johns. Rep. 84. *Jackson v. Dego*, 3 Johns. Rep. 422.

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term in the conveyance of the inheritance, as an incumbrance, although it is assigned to attend by a separate deed. This practice is very incorrect, for the term is a protection, and not an incumbrance ; and the exception in the conveyance effectually defeats the advantages which (*) might otherwise be derived from the term being assigned by a separate deed.

IV. Where trustees ought to convey to the beneficial owner, it will, upon a trial, be left to the jury to presume where such a presumption may reasonably be made, that they have conveyed accordingly, in order to prevent a just title from being defeated by a matter of form(*t*)(244).

But where the trustee of a term is not joined in an ejectment brought by his *cestui que trust*, and the jury state in a special verdict, or a special case, that the term still continues, the plaintiff cannot prevail at law, but will be defeated by the legal estate in his trustee(*u*)(245). This

(*t*) *Lade v. Holford*, Bull. Ni. Pri. 110, as explained in *Doe v. Sybourn*, 7 Term Rep. 2 ; and *Roe v. Reade*, 8 Term Rep. 118 ; and see *Doe v. Staple*, 2 Term Rep. 634 ; *Tankard v. Wade*, Irish Term Rep. 162 ; and *Hillary v. Waller*, 12 Ves. jun. 239.

(*u*) *Goodtitle v. Jones*, 7 Term Rep. 47 ; *Roe v. Reade*, 8 Term Rep. 118 ; and see *Doe v. Staple*, 2 Term Rep. 684.

(244) See *Jackson v. Pierce*, 2 Johns. Rep. 226. *Jackson v. Moore*, 13 Johns. Rep. 513. *Doe v. Phelps*, 9 Johns. Rep. 169. *Doe v. Campbell*, 10 Johns. Rep. 475.

(245) *Cestuis que trust* may support ejectment in their own names, in *Pennsylvania* ; otherwise, they would be without remedy in the case of an obstinate trustee, there being no court of equity in that state : *Kennedy v. Fury*, 1 Dall. 72. An equitable title is sufficient to support the action. Chancery powers having devolved on the courts of law, are exercised through the instrumentality of jurors. *Smith v. Patton*, 1 Serg. & Rawle, 80. So, ejectment will lie against the vendor of real estate, on articles of agreement, after the tender of the purchase money. *Hawn v. Norris*, 4 Binn. 77. *Minsker and Bale v. Morrison*, 2 Yeates, 344. So, the vendor may maintain ejectment against the ven-

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must inevitably happen where a term of years has been assigned to attend the inheritance upon a purchase of the fee, and the purchaser brings an ejectment in his own name only. It were clearly too much to presume a surrender of a term which the owner has so anxiously kept distinct from the inheritance(*x*).

This was so stated in the last edition of this work ; but the point has since undergone much discussion, and the leading heads of the argument, and the present state of the law on this head, must now be retraced(I).

It has long been the policy of our Legislature to encourage the free alienation of real property, and secure the titles of *bona fide* purchasers. Our statute book abounds with laws having this tendency. The same spirit pervades (*)the common law. We are told that the maxims of the common law, which refer to descents, discontinuances, non-claims and collateral warranties, are only the wise arts and intentions of the law to protect the possession and strengthen the rights of purchasers. A purchaser is a favorite of a court of equity. It is the settled law of that court, that if a man buy an estate fairly he may get in a term of years, or other incumbrance, although it is satisfied, and thereby defend his title at law against any mesne incumbrance of which he had not notice. It were idle to discuss the policy of our law. In a commercial country like ours, where one great stimulus to enterprise in commerce is the hope to possess territorial ownership, every one is interested in the free interchange of property, and the safety of purchasers. The danger of latent in-

(*x*) See *Doe v. Scott*, 11 East, 478.

(I) This was the statement in the 6th edition.

dee in possession, if the purchase money be not paid. *Mitchell v. De Roche*, 1 Yeates, 12. See further, *Newhall v. Wheeler*, 7 Mass. Rep. 189.

cumbrances renders it necessary that every possible guard should be thrown around purchasers. The policy of the law in this respect led to the received doctrine as to terms of years attendant on the inheritance. Abstractedly considered, nothing can be more absurd than that a purchaser of the fee should procure a term of years, created a century ago, to be assigned to a trustee for him. But with reference to the protection to be derived from such a term of years, it is of the deepest importance to a purchaser that he should keep it on foot. At law, every term of years in a trustee is *a term in gross*. This, which was distinctly laid down by Lord Hardwicke^(y), should never be lost sight of. The moment that a court of law acts upon the term as a part of the inheritance, it strikes at the root of the settled doctrines of centuries, shakes the landmarks of the law of real property, and renders insecure the title of every purchaser in the kingdom. Our law permits the creation of terms of years for any period of time. Where a term, whether for one hundred or ten (*)thousand years, is created by way of use, it invests the person to whom it is granted with a legal right to the estate during the period specified. It is not necessary by our law, that possession should accompany the legal estate in order that the title of the legal owner should continue unbarred. Possession by my tenant, or by a person with my permission, or acknowledging my title, is in law possession by me, and during such tenancy or holding my title remains unimpeached; therefore, although the legal owners of the fee of an estate have enjoyed it for the last one hundred years, yet that will not affect the existence of a term of years in the trustee to attend the inheritance, because the possession of the legal owner of the fee is the possession of the termor; their titles are consistent,

(y) 1 Term Rep. 765.

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and support each other(1). The owner of the fee is as a tenant at will to his own trustee. It frequently happens that the owner of the fee is indebted to the term of years for his peaceable possession ; such a possession, therefore, operates as a continual acknowledgment of the legal title of the termor, and proves its efficacy. The term is anxiously assigned to attend the inheritance ; it does accordingly attend the inheritance ; and the performance of the very service for which it was created never can be a ground for defeating its legal operation. Upon principle, therefore, a term of years assigned to attend the inheritance ought not to be presumed to be surrendered unless there has been an enjoyment *inconsistent with the existence of the term, or some act done in order to disavow the tenure under the termor, and to bar it as a continuing interest*. This has always been the received opinion of the Profession, and particularly of that class of the Profession to whom titles are more particularly referred. It matters very little what is the opinion of any individual (*)conveyancer ; but the opinion of the conveyancers, as a class, is of the deepest importance to every individual of property in the state. Their settled rule of practice has accordingly, in several instances, been adopted as the law of the land, not out of respect for them, but out of tenderness to the numerous purchasers who have bought estates under their advice.

As judgments, and other incumbrances, are infinite, and it is impossible to rely even upon searches for them, the doctrine, that a term of years attendant on the inheritance should protect a purchaser against incumbrances of which he had not notice, was long since established. This rule of property was shaken in the time of Lord Mansfield, when the courts of law broke down the boundary between them and courts of equity ; but the barrier

(1) See now the 3 & 4 W. 4, c. 27.

has since been restored, and equitable doctrines are no longer acted upon in courts of law.

Now, with a view to discuss at large the doctrine of presuming a surrender of a term assigned to attend the inheritance, let us suppose a term of years to be created in the year 1700, by way of mortgage. *B.* buys the fee in 1760, and pays off the mortgage, and the term is assigned to a trustee for *B.*, his heirs and assigns, and to attend the inheritance. *B.* lives till 1819, without disturbing the term, or in any manner recognizing its existence. Can it be contended that a surrender of the term should be presumed? Was not *B.*'s possession consistent with the existence of the term immediately after the assignment in 1760? If so, when did it become adverse to it? What necessity was there for any act recognizing the existence of the term whilst *B.*'s continued possession was consistent with the term, and was supported by the trust upon which it was assigned? If the term ought to have been recognized from time to time, how often should this act be repeated; once a week, or once a month? Is there (*)any ground upon which, in 1819, a surrender can be presumed on the strength of *B.*'s possession, which would not be equally operative the first week, nay, the first day after the purchase in 1760? In the absence of evidence of a surrender, it is impossible, on any sound principle, to presume one; unless the precise instant can be pointed out when the owner of the inheritance was desirous no longer to have the benefit of the term. Without his presumed concurrence a surrender cannot be presumed; for the trust was not to surrender the term, by which means incumbrances might be let in, but expressly to keep it on foot, in order to exclude them. A surrender by the trustee, therefore, without the direction of his *cestui que trust*, would be a breach of trust. It is said that the expense of making out a representation to a termor makes the

term a burden instead of a benefit to the owner of the fee. It is not, however, denied that the owner of the fee may keep on foot a term attendant on the inheritance, and that no court of law can control his power to do so. Where he has exercised his power, and declared, without any limitation of time, that the term shall be attendant on the *inheritance*, and be in trust for him, his *heirs and assigns*, does not this mean that the inheritance shall be so attended during all the years to come in the term?— and if it do, what power has a court of law out of a morbid compassion for him, on account of the expense which it may occasion, to presume a surrender of the term which he has so anxiously kept on foot? particularly as at the very moment that a surrender of the term is presumed, its existence may be required to protect the estate against a latent incumbrance; and the Court has no means whatever to ascertain whether there is any such incumbrance. The amount of the expense, too, must depend upon the particular circumstances of each case: and yet it would hardly be desirable that the rule should depend on the quantum (*) of expense which an assignment would occasion. If, however, expense is to be adverted to, on that ground alone surrenders should not in such a case be presumed; because that doctrine would weaken a purchaser's reliance on any given term of years; he would in almost every case search for judgments. This could not be done without expense; and where a man has been in the habit of confessing judgments, it very seldom happens that satisfaction is entered upon them when they are paid off. This leads to great expense, and difficulty in practice; because a purchaser expects the judgments to be regularly discharged; and where even a few years have elapsed since the payment of the debt, if the creditor is living and can be traced, yet he hesitates to do any further act in relation to a transaction which he considered long since closed.

If the surrender of the term cannot be presumed at *B.*'s death in 1819, we will suppose the estate to descend to *B.*'s heir at law. Now no man ever heard of an heir at law executing a deed for the sole purpose of recognizing terms of years attendant on the inheritance, or taking assignments of them to new trustees to attend, where they had already been assigned to trustees of his ancestor's nomination for that purpose. His possession, however, comes in the place of his ancestor's; and why should he be deprived of the guard which his ancestor created for his benefit? If his ancestor's possession was the possession of the trustee, it will not be denied that his possession stands in the same relation. The trust is to attend the *inheritance*, and for *B.*, his *heirs* and assigns; therefore, under the express words of the trust, the heir is entitled to the benefit of it, and his possession is the possession of the trustee.

Suppose further, that *B.*'s heir, in 1820, makes a marriage settlement without noticing the term of years, could (*) the term on that account be presumed to be surrendered? It is *not* the practice upon a marriage settlement to reassign attendant terms to new trustees; and no prudent practitioner declares the trust of attendant terms by the settlement, lest the parties upon an ejectment should be defeated by the production of their own conveyance, upon the face of which it would appear that the legal estate was outstanding; and I never saw or heard of a separate declaration to that effect on a marriage. In short, it is not the practice to advert to terms of years on a marriage settlement, or on a devolution from ancestor to heir, although, no doubt, that may have been done, and with propriety, in some particular cases. It is very rare indeed, that upon a marriage the title is investigated. In ninety-nine cases out of a hundred, the parties take up the title with the settlement, conveyance, or will, under which

the husband or wife immediately claims. This is a fact. In very few instances, and those are upon the marriages of persons of consequence, is the title investigated; and it has never been the custom to take a new assignment, or make a declaration of trust of a term before assigned to attend the inheritance. At the time of the settlement, a fraud by the husband is not contemplated. No purchaser or mortgagee would accept the title without inquiring for a settlement; and as the wife would, in most cases, be entitled to dower if there was no settlement, her concurrence in a fine would be required, and that would at once lead to a discovery of the settlement. Neither is it usual to deliver to the trustees of a marriage settlement the deeds relating to the term. The tenant for life, it is settled, is entitled to the custody of the deeds. The trustees have merely the custody of one part of the settlement.

If *B.*'s heir was entitled to the benefit of the term in 1820, when he made the settlement, can the execution (*) of the settlement deprive him of its aid? Is the act inconsistent with the existence of the term? Was it not declared to attend the *inheritance*, and to be in trust for *B.*, his *heirs and assigns*? Suppose the heir, as is usual, to take a life-estate under the settlement, and to be in of the old use, can it be contended that this portion of the old use is inconsistent with the title of the trustee, although the latter was consistent with the use in fee in the heir? Why should an act be done to recognize the term? The assignment of the term to attend the *inheritance* speaks at all times, whilst the possession is consistent with the title of the trustee of the term. The universal practice, not to require assignments of attendant terms on descents or settlements, proves unequivocally the opinion of the Profession, that the possession of the heir, and of the persons claiming under the settlement, is in law the pos-

session of the trustee of the term. Length of time in this case is unimportant. If we alter the above dates, and state *B.*'s purchase to be in 1800, his death in 1805, and the settlement in 1810, the principle is precisely the same ; and it would startle most men to hear, that because the term had not been recognized since its assignment in 1810 a surrender of it may be presumed.

If, however, the term is a subsisting interest after the settlement, let us suppose the life-estate of *B.*'s heir under the settlement to be sold immediately afterwards, without the purchaser taking an assignment of the term ; does this let in the presumption of the surrender of the term ? Now the term, it must be repeated, was assigned to attend the *inheritance*, and in trust for *B.*, his *heirs and assigns*. If the possession of the heir and his family under the settlement was not adverse to the title of the termor, how could the title of the purchaser be so ? The term is a benefit, originally assigned as such, and not an incumbrance. A man should at least reject a benefit, or act inconsistently (*) with the intention of the person bestowing it, before he is presumed to repudiate it. The event, if the event is to be looked at upon which this question hinges, shows that he required the protection of the term more than any of the former owners ; and if *his* acts are to be adverted to, we shall find him anxiously obtaining a further assignment of the term. For let us further suppose that *B.*'s heir, before his settlement, confessed a judgment which was not satisfied, and that the purchaser bought without notice of it, and when he did discover it, procured an assignment of the term to a new trustee, and set up the term as a defence against an execution upon the judgment : *Unless the presumption of the surrender is an inevitable conclusion from the fact of the purchase*, it must be admitted that there is no ground to presume a surrender. But can it possibly be laid down as a rule, that every

attendant term must be presumed to be surrendered against a purchaser who does not take an assignment of the term, or a declaration of the trust of it at the time he purchased? Why should he do so whilst his possession is consistent with the title of the termor, and expressly within the limits of the original trust? Would not an assignment, a week, or a month, or a year afterwards, before any adverse claimant appeared, be sufficient to keep the term on foot? If so, when, at what precise moment does the presumption arise?

Where an easement, for example, is enjoyed, or having been enjoyed is discontinued to be used, the user or non-user forcibly lets in the presumption of a grant in the one case, and a surrender in the other. But there the act speaks for itself. The whole argument in our case is, *that there is a continued enjoyment under the original trusts, which embrace all the persons who have successively enjoyed the estate.* Therefore, as an enjoyment of the easement would of itself, without any further assertion of right or declaration, (*)exclude the presumption of a surrender, so here the continued enjoyment must have the same operation.

Does then the appearance of the adverse claimant weaken the purchaser's case? So far from it, that in the great majority of the cases in the books the protection was not sought for until the necessity for it appeared. Equity does not regard notice at the time of getting in the term. The notice, to operate, must be fixed upon the party at the time of the completion of the purchase. Equity too will assist a purchaser where he has not got an assignment of the term, but has the better title to it. At law, the term is a term in gross, and the courts of law ought not to enter into a consideration of the equities of the parties; because they have not the necessary machinery to enable them to come to a due conclusion on the equitable rights. It has been decided in equity, that if

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a mortgagor, after a defective mortgage in fee, confess a judgment, the judgment-creditor, although he has the legal title, shall be postponed to the mortgagee(z). So it has been held(a) that a prior mortgagee, having a subsequent judgment, may tack the judgment to the mortgage; but a prior judgment-creditor getting a subsequent mortgage, cannot do so, *because the judgment is not a specific lien upon those lands*, that is, he does not go on the security; he has not trusted to the credit of the estate. A judgment-creditor therefore does not, in equity, stand on the same footing with a purchaser of the estate itself. In a case(b) where there was, 1st, an act of bankruptcy by A.; 2dly, a settlement for valuable consideration by him, without notice to the parties of the act of bankruptcy; and 3dly, a commission against him; although (*)the commission over-reached the settlement, yet the persons claiming under it were held to be entitled to the benefit of an outstanding term created prior to the bankruptcy.

These cases show the rules of equity which flow from the anxiety of the Court to strengthen the title and protect the possession of purchasers; but if at law the outstanding term is to be presumed to be surrendered, they will no longer afford any protection to purchasers.

Some stress, in favor of the presumption, has been laid on two circumstances; the one, that the estate has been quietly enjoyed; the other, that the deeds relating to the term are in the hands of the owner of the estate. The first circumstance, I have already endeavored to prove, is against the presumption of a surrender. The latter can never operate in favor of the presumption, unless

(z) *Burgh v. Francis*, 1 P. Wms. 279, cited.

(a) *Anon.* 2 Ves. 663; *Brace v. Duchess of Marlborough*, 2 P. Wms. 491.

(b) *Wilker v. Bodington*, 2 Vern. 599.

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the courts of law deny the power of a man to keep an attendant term in a trustee and the deeds in his own possession. In no case does the trustee of the term keep the deeds. They form part of the muniments of title, and are kept as such by the owner of the fee. If it be necessary upon a sale to covenant for their production, by whom but the owner should the covenant be entered into? and the covenant should of course be entered into by the person holding the deeds. The trustee of the term, even if the deeds were deposited with him, could not be compelled, and would not be advised, to covenant for the production of them. Besides, the case of *Doe v. Scott*, which will be referred to presently, fully answers that objection. That the judgment-creditor has not the possession of the deeds, and therefore the surrender, if there be one, is not likely to be in his hands, cannot surely be a ground to presume that there actually is such a surrender. If the judgment-creditor has the better equity, which is the true inquiry in these cases, he may (*)file a bill against the purchaser, who would be compelled to answer, whether there was a surrender or not.

Suppose that the assignment, when it is taken, is made not by the original trustee, who is dead, but by his son, who has regularly taken out administration to him, does that weaken the case? Certainly the administrator could not know that his father had not surrendered the term in his life-time; but he was more likely to know the fact than any other person. For the family solicitor would of course peruse the deed on his behalf; and if a surrender had been made of the term, which probably would have passed through his office, he would not have suffered the son, as administrator, to execute an assignment of it. Besides, if some deed is, in the absence of all evidence of its actual execution, to be presumed, why should not a new assignment to attend be presumed, if that were

necessary to support the purchaser's title, rather than a surrender, which would operate to defeat it? For his possession was consistent with the term, and he trusted his money on the security of the estate itself, which the judgment-creditor did not.

Fifteen years ago, it was very much the practice to leave terms already assigned to attend the inheritance, in the original trustees, and to be satisfied with a general declaration of trust of all attendant terms. It never occurred to the highly respectable persons by whom that practice was adopted, that a surrender of the terms could be presumed. It were difficult to contend that a mere general declaration is sufficient to keep the term alive, if without it the presumption of its surrender would be let in. The trustee of the term, by force of the original trust, becomes, without any further declaration, a trustee for the purchaser. Now if the trust be a trust for the purchaser, and the latter do no act amounting to a disclaimer of the benefit of the trust, how can it vary his rights, that (*)he neglected to re-declare that which has already been expressly declared, viz. that the trustee should hold the term for the original owner, his heirs and assigns, and to attend the inheritance?

Lord Hardwicke, in *Willoughby v. Willoughby*, enters very fully into this doctrine. He admitted, that where an old term has been assigned upon an express trust to attend the inheritance as settled by such a deed, and the conveyancer is satisfied that the uses of the inheritance have never been barred till the new purchase or settlement is made, he may very safely rely upon it, because the very assignment carries notice of the old uses. Nay, where the assignment has been generally in trust to attend the inheritance, and the parties approve of the old trustees, they may entirely rely upon it, especially in the case of a purchase, where the title-deeds always are or ought

to be taken in ; for if he has the creation and the assignment of the term in his own hands, no use can be made of it against him(c). Lord Hardwicke thus states cases in which terms may be safely left in the original trustee ; but it never occurred to him that the circumstance of so leaving them would let in the presumption that they were surrendered.

It is said that this doctrine withdraws a large portion of the real property in the kingdom from the jurisdiction of the courts of common law. That, however, is not so ; because the title of the termor is the legal one, and therefore those courts, in such cases, decide upon the legal title, which only is within their province. The term is set up, not in bar of the jurisdiction over the property, but in consequence of the rule of the court itself, which forbids an equitable tenant to recover against the legal title. If even the doctrine had the supposed operation, (*)that would depend upon the law of the land, and if it required alteration should be altered by the Legislature. But the courts of law have been so anxious to support attendant terms, that it has been settled ever since the reign of Charles 2. that such a term shall not be barred, even by a fine levied by the owner of the fee, against the intention of the conusor ; because such an owner of the inheritance must be taken as tenant at will to his trustee, and then his possession is the possession of the trustee(d).

Mr. Justice Buller observed, in *Doe v. Pegge*(e), that so long ago as the time of Justice Gundry, when an outstanding satisfied term was offered as a bar to the plaintiff's recovery, that Judge refused to admit it, saying that there was no use in taking an outstanding term but for

(c) 1 Term Rep. 772.

(d) 1 Ventr. 82 ; 2 Ventr. 329 ; 1 Sid. 460.

(e) 1 Term Rep. 760, n.

the sake of the conveyancer's pocket ; since which time, Mr. Justice Buller added, it has been the uniform practice, that if the plaintiff be^f entitled to the beneficial interest, he shall recover possession. It does not appear in what case Mr. Justice Gundry made this sweeping observation. It is, however, not law at this day, and indeed never was to the extent in which it was laid down ; and Mr. Justice Buller lived to see the law on this subject restored, and his own opinions over-ruled(^f). In the same case of Doe and Pegge, Lord Mansfield observed, *that trusts are a mode of conveyance peculiar to this country*. In all other countries the person entitled has the right and possession to himself ; but in England estates are vested in trustees, on whose death it becomes difficult to find out their representatives, and the owner cannot get a complete title. If it were necessary to take assignments of satisfied terms, terrible inconveniences would ensue, (*)from the representatives of the trustees not being to be found. Sir Edward Northey's clerk was trustee of near half of the great estates in the kingdom. On his death it was not known who was his heir or relative. So that, where a trust-term is a mere matter of form, and the deeds mere muniments of another's estate, it shall not be set up against the real owner. It must excite surprise, that Lord Mansfield should have imagined that any rule, whose tendency it was to subvert what was peculiar to this country, could long subsist while the peculiarity itself was allowed to exist. As well might you admit the rule which excludes the half blood, and yet, in the face of contrary evidence, presume that a brother of the half blood proceeded from the same couple of ancestors as the person last seised(I). Is the whole system of trusts

(^f) See Doe v. Staple, 2 Term Rep. 684.

(I) This argument, in this and other passages, speaks of the law as (*484)

to be subverted because sometimes an obscure trustee dies without relations? Or is the legal estate to subsist, or not, according to the expense which a re-conveyance may occasion in any given case? This doctrine never could stand the test of an accurate investigation, and has long since been over-ruled. They who have best understood the doctrine of equity, have powerfully deprecated their adoption by courts of law.

In *Goodtitle v. Morgan(g)*, a mortgage for nine hundred and ninety-nine years was made in 1761, by Jones, the owner of the fee. In 1767, Jones made a mortgage in fee to Morgan; and in July 1769 he made a mortgage in fee to another person. In 1768, the nine hundred and ninety-nine years term was assigned to a trustee for Jones, and to attend the inheritance. The first mortgage in fee (*) was before that assignment, and the last after it. In December 1769, he made a mortgage in fee to Sprigg, and the term of nine hundred and ninety-nine years was assigned to a trustee for Sprigg, and he was allowed to recover in ejectment, on the demise of his trustee, against the two prior mortgagees in fee; although it was speciously argued, that if, previous to the conveyance in 1769 to Sprigg, the defendants had brought ejectments upon their mortgages, neither Jones nor his trustee could have set up his term as a bar to their ejectment; and that, if Jones himself could not set up the term, it seems to be absurd to say that those who claim under him can, for they cannot claim a greater estate than he had. But this argument did not prevail, although Mr. Justice Buller did not put the decision on the right grounds. The case is an authority for my position. It decides clearly that a surrender of the term cannot be presumed on the ground

(g) 1 Term Rep. 755.

it was. The reader is aware that the half blood is not now excluded, and that fines are abolished.

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that the first mortgagee did not take an assignment or a declaration of trust of it. A second mortgagee, therefore, procuring an assignment of the term, must prevail at law, and also in equity, unless he had notice at the time he advanced his money of the first mortgage.

In *Doe v. Staple*(*h*), Lord Kenyon, C. J. said, that he extremely approved of what was said by Lord Mansfield in the case of *Lade v. Holford*, that he would not suffer a plaintiff in ejectment to be nonsuited by a term standing out in his own trustee, or a satisfied term set up by a mortgagor against a mortgagee, but would direct a jury to presume a surrender. He added, "I much approve of that; and where a surrender is presumed, there is an end of the legal title created by the term."

In *Doe v. Sybourn*(*i*), the same learned Judge said, that in all cases *where trustees ought to convey to the beneficial* (*)owner, he would leave it to the jury to presume *where such a presumption might reasonably be made*; that they had conveyed accordingly, *in order to prevent a just title from being defeated by a mere matter of form*(*k*).

Now these rules, it will be observed, are not in favor of presuming a surrender of a term expressly assigned to attend the inheritance against a purchaser. The doctrine that a mortgagor shall not set up an attendant term against a mortgagee does not warrant the presumption of a surrender in this case. In the former case, there are only the rights of the mortgagor and mortgagee still in question, and the presumption is made in favor of the mortgagee. The claim of a third person does not intervene. But does it follow that a surrender should be presumed, not as between the mortgagor and mortgagee, but as

(*h*) 2 Term Rep. 696.

(*i*) 7 Term Rep. 2.

(*k*) And see *Goodtitle v. Jones*, 7 Term Rep. 47; *Roe v. Reade*, 8 Term Rep. 118.

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between two innocent mortgagees, both claiming under the same mortgagor, where one, after the execution of both of the mortgages, has obtained an assignment of the term? Why is he to be deprived of the benefit of his diligence? Why is this plank in the shipwreck to be taken from him? The doctrine can with much less propriety be applied where the person who has obtained an assignment of the term is an actual purchaser of the estate, whilst the person whom he seeks to exclude by the term is a mere judgment-creditor, having only a general lien over all the seller's property, and who perhaps suffered the judgment to remain dormant many years. The objection is not, that a surrender cannot be presumed against *an owner of the inheritance*, but that the presumption ought not to be made against a *purchaser* of the inheritance, where the contest is between him and incumbrancers claiming under the *seller*, but of whose claims (*) he had not notice. Even the case of *Goodtitle v. Morgan*, in the decision of which Mr. Justice Buller concurred, proves that the mere circumstance of executing mortgages without assigning the term, does not let in the presumption of a surrender against a subsequent mortgagee who takes an assignment of the term. Upon principle, it seems impossible to contend that the circumstance of the last mortgagee not procuring the assignment at the very moment he advances the money can let in the presumption of a surrender.

The rule, that where trustees ought to convey to the beneficial owner a jury may presume such a conveyance, in order to prevent a just title from being defeated by a mere matter of form, is not denied to be a wise one; but it does not apply to the case under discussion; for in this case the trustees ought *not* to surrender the term; to do so would be to commit a breach of trust; and the presumption, if it is made, has not the merit of preventing

a just title from being defeated by a mere matter of form, but lets in one title to the destruction of another, *where the equities are at least equal*; for if the subsequent purchaser has not *equal equity* with the prior incumbrancer, equity itself will deprive him of the protection of the legal term, although beyond dispute an existing one.

The case of *Keene v. Deardon*(*l*), proves, that possession, where it is consistent with the title of a trustee, cannot be deemed adverse to it; and that no presumption of a surrender can be made contrary to an express trust. This proves both the propositions in the case under discussion. Possession is certainly evidence of title, but it is not evidence of the quality of the title. It does not prove whether you are seised in fee, or have a mere chattel interest; nor does it prove whether your title is legal or equitable. And therefore possession may always (*)be shown to be consistent with the title of a trustee of an attendant term. After an express trust to attend the inheritance, a surrender of the term should never be presumed where the rights of the *cestui que trust* are not invaded by the trustee, and the *cestui que trust* has done no act to disavow his right to the trust of the term.

The case of *Doe v. Scott*(*m*), is a strong authority against the doctrine of presumption. In 1727, Lord Oxford executed a mortgage for a term of one thousand years. In 1751, Lord Oxford executed a marriage settlement, wherein it was stated, that 27,000*l.*, part of the lady's fortune, was to be applied to the discharge of the mortgage. Since that time no mention was made of it, nor was there any other evidence of its existence, till, in a mortgage-deed of the 3d of December 1802, this term, together with another outstanding term of 1709, was assigned to secure the mortgage-money. It was insisted

(*l*) 8 East, 248.

(*m*) 11 East, 478.

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that a surrender of the term ought to be presumed, on two grounds: 1st, the recital in the deed of 1751, that there was an adequate sum to be applied in discharge of the mortgage, and no evidence of the term having been acted upon or recognized from that period until 1802, when it was assigned as an outstanding term; and, 2dly, the possession of the deed itself by Lord Oxford, the owner of the inheritance, which could not have happened unless the mortgage had been paid off. The learned Judge who tried the cause held, that although no notice had been taken of the term from 1751 till 1802, yet the owner of the inheritance having then joined with the representatives of the termors in executing a deed, in which it was recited that the term had not been surrendered, he thought that a surrender could not be presumed. The Court of King's Bench were of the same opinion. Lord Ellenborough, C. J. said, that there was no purpose of (*)justice to be answered by presuming a surrender in this case; nor was it for the interest of the owner of the inheritance to have it assigned to a trustee to attend the inheritance.

Now this case went much farther than it is necessary to push the doctrine in the case under discussion. In 1751, a sum was appropriated to discharge the incumbrance; and as the deeds were in Lord Oxford's possession, the mortgage must have been paid off. The term had not been assigned to attend the inheritance, and, therefore, for fifty-one years, the period between 1751 and 1802, the term was *an incumbrance*, and not a benefit; and yet the assignment of 1802 was held to be evidence against a surrender. Why was it stronger evidence than the assignment of the term in trust for the purchaser in our case? Here, too, the term had been assigned to attend the inheritance, and therefore the possession was consistent with the express trust of the term; whereas in

Lord Oxford's case the freeholder's possession was only consistent with the legal title in the mortgagee, under the *equitable* rule, that the mortgagee, when paid off, became a trustee for the owner of the inheritance. It is said, however, that there it was for the benefit of the owner that the term should be kept on foot. What circumstance in the supposed case required that the term should be presumed to be surrendered? Was not the purchaser the owner of the estate? And was it not for his benefit that the term should be deemed a subsisting interest?

Lord Eldon's opinion does not accord with the doctrine of presuming surrenders of attendant terms. In *Evans v. Bicknell*(*n*), which was decided in 1801, that learned Judge observed, that it seemed to him rather surprising, if he might presume to say so, that Lord Mansfield, who (*)concurred with Mr. Justice Buller in a great many of these equitable principles in a court of law, should not have attended to these distinctions, which perhaps will be found in the very principles upon which the Court of Chancery exists. Titles to property may possibly be found to be very considerably shaken by the doctrine of the Court of King's Bench as to satisfied terms. The law as to that here is, that a second mortgagee having no notice of the first mortgage, if he can get in a satisfied term, would do that which is the true ground of the decision, though it is not put upon that by Mr. Justice Buller; he would, as in conscience he might, get the legal estate, and by virtue of that protect his estate against the first mortgagee, having got a prior title, the conscience being equal between the parties. When once it is said at law that a satisfied term should not be set up in ejectment, the whole security of that title is destroyed; and therefore, even with the modern correction that doctrine has received in the late cases, which is, that you may set up

(*n*) 6 Ves. jun. 184.

(*490)

the term, though satisfied, and put it as a question to the jury, whether an assignment is to be presumed, it seemed to his Lordship very dangerous between purchasers; and the leaning of the Court ought to be that it was not assigned: and he fully concurred with Lord Kenyon, *that it is not fit for a Judge to tell a jury they are to presume a term assigned because it is satisfied; but there ought to be some dealing upon it*, or you take from a purchaser the effects of his diligence in having got in the legal estate, to the benefit of which he is entitled. Then suppose the law takes upon itself to decide the question between purchasers upon this subject, can it decide upon the same rules as courts of equity, as upon the question of notice? It will be said upon this doctrine a court of equity does inquire into this; and it is a rule of property in equity, and therefore ought to be a rule of property at law. But (*)how has it become a rule of property in equity? In equity, the first mortgagee may ask the second whether he had notice. If that defendant positively denies notice, and one witness only is produced, to the fact of notice, if the denial is as positive as the assertion, and there is nothing more in the case, a court of equity will not take the benefit of the term from the second mortgagee, placing as much reliance on the conscience of the defendant as on the testimony of a single witness, without some circumstances attaching a superior degree of credit to the latter. It is impossible, therefore, that the rule of property can be said to be the same as at law; and if it stands upon different principles, in fact, it is perfectly different.

In *Maundrell v. Maundrell(o)*, which was decided in 1804, the question arose, whether a purchaser could protect himself against dower by a prior term of years, unless it was actually assigned to a trustee for him; and the

(o) 10 Ves. jun. 246.

Lord Chancellor ultimately decided that he could not ; because such had been considered the general rule ; but his Lordship, upon principle, thought that the purchaser would, as in other cases, be entitled to the benefit of the term without an actual assignment. He said that he doubted whether it was possible upon principle, to say the assignment of a term that has been once assigned to attend the inheritance, is necessary from time to time whenever that inheritance is made the subject of purchase(*p*).

The opinion of Lord Eldon therefore is, that an assignment of the term is not necessary upon every new purchase ; and this is a powerful authority against the presumption of a surrender, on the mere ground that the term has been left undisturbed. *Maundrell v. Maundrell* is not an authority requiring an assignment in every (*)case upon every new purchase ; but whilst it establishes the necessity of an actual assignment, in order to bar dower, is a grave authority for the continued existence of the term in other cases, although it is left in the name of the original trustee(*I*).

In the late case of *Doe* on the demise of *Burdett v. Wright*, B. R. T. T. 1819, a term assigned in 1735, to raise an annuity, and subject thereto to attend the inheritance, was presumed to be surrendered. No act had been done to acknowledge the term, except that, upon a sale in 1801 of a small part of the estate, for redeeming the land-tax, the owner had covenanted to produce to the purchaser the deeds creating and assigning the term. There, however, the ejectment was by a person claiming as heir, against a person who claimed also as heir(*q*).

But in the cases of *Doe v. Hilder*, and *Doe v. Stace*,

(*p*) 10 Ves. jun. 259 ; and see p. 269.

(*q*) MS. ; S. C. 2 Barn. & Ald. 710.

(*I*) This also applies to the old law. Now a wife's right to dower is in her husband's power.

(*492)

B. R.(r),(II), which were decided afterwards in the same (*)term, it appeared that the ejectment was brought by a judgment-creditor, who had issued an elegit against Richard Newman. In 1762 a regular mortgage-term of one thousand years was created by Francis Hare Naylor, the owner of the fee, and several other charges were made previously to and in the year 1770. In 1771, Naylor devised the estate to trustees, to sell. In 1779, they sold, and conveyed to John Newman in fee, and the one thousand years term was, in consideration of the payment of the mortgage-money, assigned by a separate deed (7th October, 1779) to a Mr. Denman, his executors, administrators and assigns, “in trust for the said John Newman, *his heirs and assigns*, and to be assigned, conveyed, and disposed of, as he or they should direct and appoint. *And in the mean time, and until such appoint-*

(r) MS. ; S. C. 2 Barn. & Ald. 782.

(II) Another question of great importance arose in these causes, which it became unnecessary to decide, viz. whether the statute of frauds enabled a judgment-creditor, under an elegit, to take the term in execution. The statute, it is decided, did not intend to place the right of the creditor on the same footing against an equitable as against a legal estate ; and it does not enable him to take in execution an equity of redemption, or a trust in a leasehold. Now every attendant term is at law a chattel real—a term in gross, and therefore cannot be taken in execution for the debt of the *cestui que trust*. The Legislature never intended to reduce a fee-simple estate with an attendant term to a level with a chattel interest, and to give the right of execution as if it were a chattel interest, where, under the same circumstances, a mere chattel interest would not be within the statute. The act in all its provisions is inaccurately framed, and it is not desirable that another new construction should at this day be given to it. A term outstanding has always been considered to protect against judgments ; but if the construction above alluded to were to prevail, it would be necessary to search for judgments in every case, in order to ascertain whether any writ of execution had issued, or rather the term would be no protection, because it could not be discovered whether a writ had issued ; but see *Doe v. Phillips*, 1 Crompt. & Mee. 450.

(*493)

ment to attend and wait upon the freehold and inheritance of the same premises," to protect the same against mesne incumbrances. In October 1790, John Newman died intestate, leaving Richard his brother and heir. In November 1797, Richard died, leaving Richard, his son, his heir, then a minor. On 23d August 1808, the last named Richard gave a warrant of attorney to the lessor of the plaintiff to enter up judgment for 4,000*l.*, which was immediately done. In 1810, Mr. Denman, the trustee of the term, died intestate, leaving John Denman, his son and next of kin. In October 1814, Richard Newman, on his marriage, settled the estate to the use of himself for life, with remainder over in strict settlement. In June 1816, he sold and conveyed his life-estate to his mother, and she devised the estate to the persons under whom the defendant claimed as tenant. In 1817, the (*)lessor of the plaintiff issued an *elegit*, without having revived the judgment, and had an inquisition taken thereon, which was set aside for irregularity. In 1818, he revived the judgment by *scire facias*, and issued an *elegit*; and on 13th March 1818 an inquisition was taken thereon, and then the ejectment was brought. On 17th March 1819 (after the commencement of the ejectment), John Denman, as the son and next of kin of Mr. Denman, took out letters of administration to him, and by a deed, dated the 19th of the same month, he, by the direction of the devisees of the purchaser, in the usual and regular way, assigned the term to John Newman, a trustee for them, and to attend the inheritance. *The deed creating the term was produced by the purchaser of the largest part in value of the estate comprised in it. The deed assigning the term to attend on the purchase by Mr. Newman, in 1779, and the last deed of assignment, were produced by the defendants.* The learned Judge thought that the question as to a surrender ought to go to a jury. His Lordship told them, (*494)

that it seemed to him that as a trustee was appointed forty years ago, and had never done any act, but that the party who was beneficially interested had always acted on the property, he (the learned Judge) could not consider an administration taken out but a week before the assignment as at all effective; that he considered to be done merely for the purpose of setting up this old term to defeat the plaintiff; and under such circumstances he should leave it to them to presume it had been surrendered, which according to the learned Judge's report the jury expressly said they did. The Court of King's Bench, after hearing the case argued at considerable length, and taking time to consider, confirmed the learned Judge's direction.

Lord Chief Justice Abbott delivered the following judgment, according to the short-hand writer's note :

(*)“ This was an action of ejectment tried before my brother Park at the last assizes for the county of Sussex. The title of the lessor of the plaintiff was upon a judgment recovered in the year 1808, against Richard Newman, for 8,000*l.* and a writ of elegit and inquisition thereupon in the year 1818, finding Richard Newman seised in fee of the premises in question. It was further proved, that the defendant occupied the land as a tenant, and had declared that he considered it to belong to Richard Newman, and had delivered to him a notice of a judgment received in June 1818, from the lessor of the plaintiff. On the part of the defendant it was proved, that on the 23d of June 1762, Francis Hare Naylor had conveyed the premises in question, *inter alia*, to Thomas Carter, for a term of one thousand years, by way of mortgage, for securing the sum of 6,000*l.* : That in the year 1779, the mortgage was paid off, and deeds were then executed, whereby, in effect, the term was assigned to William Denman, in trust for John Newman, a purchaser

of the premises, and to attend the inheritance : That in the month of October 1814, the said Richard Newman, to whom the premises had descended from the purchaser John Newman, made a settlement upon his intended marriage, whereby he conveyed the premises to trustees and their heirs, to the use of himself for life, with a remainder to his intended wife for life, remainder to the issue of the marriage, and reversion to himself in fee : That in the year 1816, the said Richard Newman conveyed his life-estate to Sarah Newman, the mother of Richard, as a security for 1,162*l.*, which appears to have been money then due from him to her : That Mrs. Newman, the mother, died in the year 1817, having previously devised her interest to some other relations : That William Denman, to whom the term had been assigned in trust, to attend the inheritance as aforesaid, died about four years ago ; and (*)on the 19th of March last, his son took out administration to him, and executed a deed, purporting to be an assignment of the term, to a person therein named, in trust for the devisees of Mrs. Newman, the mother. Upon this evidence, two questions were made at the trial : first, whether the term might be presumed to have been surrendered and merged in the inheritance ; and if it might not, then, whether it was a trust within the tenth section of the statute of frauds, so as not to stand in the way of the execution on the judgment. The learned Judge thought this a case in which a jury might presume a surrender of the term ; and the matter being left to them, they found that the term had been surrendered. A motion was afterwards made for a nonsuit, according to leave given by the learned Judge. A rule to show cause was granted ; and the matter was argued before us very fully and ably. The same two points were made ; and with respect to the statute of frauds a further point also, it being contended, first, that the trust of a term of years is not within

the tenth section of the statute ; and, secondly, if it be, yet in this particular case, the statute would not help the plaintiff, because the termor must be considered as a trustee, not for the debtor, but for the devisees of Mrs. Newman, at the time of issuing the execution. Upon these points, however, it is not necessary for us to pronounce any judgment ; because we are of opinion, that in this case the surrender of the term might lawfully and reasonably be presumed. It is obvious that if such a surrender had been made, it would not probably be in the power of the plaintiff to produce it, he being a stranger to the particulars of the title which his debtor had in the land. The principal ground of objection to the presumption was, that such a presumption had in no instance hitherto been made against the owner of the inheritance, the former instances being (as it was said) all cases of presumption (*) in favor of such owner. But this proposition appears to be too extensively laid down. One of the instances in which it has been said that a surrender shall be presumed, is the case of a mortgagor setting up a term against his own mortgagee ; and this is said generally, and without distinction, between a mortgagee in fee or for years. But if such a term be set up against a mortgagee for years, and a surrender presumed, the presumption is made against, and not in favor of, the owner of the inheritance. It is made against his interest at the time of the trial, but in favor of his honesty at the time of the mortgage ; for if the term existed at the time of the mortgage, he ought in honesty to have secured the benefit of it to the mortgagee at that time, and not to have reserved it in his own power as an instrument to defeat his mortgage ; and upon the same principle on which a surrender is presumed in the case of mortgagor and mortgagee, we think it may reasonably be presumed in the present case ; though the principle is applicable not to the judgment-

creditor but to other persons. One of the general grounds of a presumption is the existence of a state of things which may most reasonably be accounted for by supposing the matter presumed. Thus, the long enjoyment of a right of way by *A.*, to his house or close, over the land of *B.*, which is a prejudice to the land, may most reasonably be accounted for by supposing a grant of such right by the owner of the land ; and if such a right appear to have existed in ancient times, a long forbearance to exercise it, which must be inconvenient and prejudicial to the owner of the house or close, may most reasonably be accounted for by supposing a release of the right. In the first class of cases, therefore, a grant of the right, and in the latter, a release of it, is presumed. Where a term of years becomes attendant upon the reversion and inheritance, either by operation of law, or by special (*) declaration upon the extinction of the objects for which it was created, the enjoyment of the land by the owner of the reversion, thus become the *cestui que trust* of the term, may be accounted for by the union of the two characters of *cestui que trust* and inheritor, and without supposing any surrender of the term ; and therefore, in general, such enjoyment, though it may be of very long continuance, may possibly furnish no ground to presume a surrender of the term. But where acts are done or omitted by the owner of the inheritance, and persons dealing with him as to the land, which ought not reasonably to be done or omitted, if the term existed in the hands of a trustee, and if there do not appear to be any thing that should prevent a surrender from having been made ; in such cases the things done or omitted may most reasonably be accounted for by supposing a surrender of the term, and therefore a surrender may be presumed. We think there are such things in the present case. In the year 1814, Richard Newman, the debtor, and then owner

of the inheritance, made a settlement upon his intended marriage, which took place immediately. Upon such an occasion, the title and title-deeds of the husband would probably be looked into by professional men on the part of the husband, at least, if not on the part of the wife also; and notwithstanding the assertion of one of the learned gentlemen who argued this case on the part of the defendant, and by whom we were informed that it is not usual on such occasions to take any notice of an outstanding satisfied term, we cannot forbear thinking that such a term always ought to be, and frequently is, in some way noticed, either by the deed of settlement, or by some separate instrument; because, if not noticed, and the termor not called upon to assign the term to the uses of the settlement, nor any declaration of trust made of it to those uses, it may afterwards be made an instrument (*) of defeating the settlement. The title-deeds usually remain with the husband, and if he be driven by necessity to borrow money, he may meet with a lender who has no notice of the settlement, and by handing over his deeds, and obtaining an assignment of the term to him and other conveyances, give to him a title that must prevail both at law and in courts of equity against the settlement. The supposed practice of taking no notice of outstanding terms, on such an occasion, appears to have been insisted upon before Lord Hardwicke, in the case of *Willoughby v. Willoughby*, as applied to marriage settlements and purchases. But that very learned Judge, in giving his judgment in that case, says he had inquired of a very learned and eminent conveyancer, and could not find that there had been any such general rule; and he afterwards proceeds to say, "Where the assignment has been generally in trust to attend the inheritance, and the parties approve of the old trustees, they may safely rely upon it, especially in the case of a purchase or mortgage, where

the title-deeds always are, or ought to be, taken in ; for if he has the creation and assignment of the term in his own hands, no use can be made of it against him." Such instances as these may account for the practice in many cases, but cannot constitute a general rule. If in the present case it had appeared that the deeds relating to the term were delivered to the trustees of the marriage settlement as one of the securities for the settlement, the case would have stood on a very different ground. The marriage settlement, however, is not the only occasion on which we think it may most reasonably be supposed that this term, if existing, would have been brought forward. It appears that in 1816 the same Richard Newman, being then indebted to his mother, and desirous of giving her security for the debt, prevailed upon his wife to join with him in conveying to her the interest they derived (*)under the settlement. Upon this occasion, an assignment of the term, or a delivery of the deeds relating to it, would undoubtedly have been most important acts in favor of the mortgagee, because they would have protected the mortgagee against any subsequent use of the term to defeat her mortgage. On both these occasions, therefore, the term, if existing, could not have been wholly disregarded without either want of integrity on the part of Richard Newman, or want of care and caution on the part of the professional men engaged in those transactions. We think it more reasonable to presume a prior surrender of the term, than to presume such deficiencies. It certainly might not unreasonably be left to a jury to consider to what cause they would attribute these omissions, and this was done at the trial. It is true, that an assignment of the term was taken in a few days before the trial, for the alleged benefit of the legatees of the mortgagee, Mrs. Newman, on whose behalf, we were informed, the present cause was defended. But this tardy act can-

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not be of any avail, and leads not to any presumption. The assignment was made by the administrator of the person in whom the term had been vested, and the administrator would probably be ignorant of any previous surrender made by the intestate. The time for dealing with the term on behalf of the mortgagee was the date of the mortgage. An actual assignment of the term is more regarded than its mere quiescent existence. It will defeat the title to dower, which its existence only will not, according to the case of *Maundrell and Maundrell, Vesey, jun. vol. vii. page 567, and vol. x. page 246, and the cases there cited.* These observations respecting the settlement and the mortgage receive additional force from the consideration of their dates. They were both long subsequent to the judgment, and they are the acts of a person materially interested in protecting the land from (*)the judgment, and excluding all questions on the subject of priority, or otherwise; in the case of the settlement, for the sake of his intended wife, and the issue that he might expect by her; and in the case of the mortgage, for the sake of the mortgagee, to whom he was so nearly related, and who also was evidently a favored creditor. And it cannot be denied, that an actual assignment of the term would have been in many respects more operative against the judgment than its mere existence. In the case of the mortgage, it would have put an end to all question upon the statute of frauds, by making the termor specifically a trustee for the mortgagee before execution issued, according to the case of *Hunt v. Coles, 1 Com. Rep. 226.* For these reasons we think the verdict ought not to be disturbed, and the rule must therefore be discharged."

It will at once be observed, that this is a stronger case in favor of the existence of the term than that which we have been considering. There was no circumstance which pointedly called for an assignment of the term before the

period when one was made ; for an assignment is never made by reason of descents, or of a marriage settlement. . Previously to the sale, therefore, the presumption could not on any reasonable ground be let in ; and if not, such a presumption ought not to have been made at all. There could be no doubt which ought to be preferred, the purchaser, or the judgment-creditor. The latter obtained his judgment on a warrant of attorney, and slept on his security for ten years, and never had a specific lien on the estate, but a general security riding over the whole of the seller's property ; whereas the purchaser not only bought the estate itself without notice of the incumbrance, but had possession of all the deeds relating to the term, to the possession of which he was entitled as a purchaser. That circumstance alone, even as between two mortgagees of the estate itself, both equally innocent, would (*)give the better right to the one holding the deeds(s). As between a purchaser of the estate and a mere judgment-creditor, the rule applies with irresistible force. The purchaser, therefore, clearly had *the better equity* ; and the presumption of the surrender, without any evidence upon which to ground it, let in the judgment-creditor on the estate in the hands of the purchaser, although, according to equity and good conscience, the creditor had no title to rank as such. *The presumption too let in the judgment-creditor on the estates provided for the wife and children by the marriage settlement ; for the term could not be presumed to be surrendered against the purchaser, and in existence for the benefit of the wife and children.* And yet counsel in very great practice never knew an instance of an attendant term being re-assigned on a marriage, and have suffered hundreds of settlements to be executed without requiring such an assignment ; so that the provisions made for very many families may be deeply incumbered

(s) *Stanhope v. Earl Verney*, 2 Eden, 81.

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if this new rule is to be followed. It will not be contended that the subsequent conduct of the purchaser of the life-estate ought to affect the wife and children of the seller; and yet it is undeniable that the circumstance of the purchaser not taking an assignment of the term was relied upon as a strong ground in favor of the presumption. The assignment was made by Denman's administrator, who was regularly such as next of kin, and not a mere stranger, procuring a limited administration *de bonis non*, for the purpose of assigning the term.

The above decision powerfully attracted the attention of the Profession. An ejectment was afterwards brought by the Newmans and Denman, against Putland, who recovered in the former ejectment, to recover back the estate(*t*). It came on at the assizes for Sussex, before (*)Mr. Baron Garrow. Upon this ejectment the lessors of the plaintiff proved a mortgage in fee of the estate to Thomas Markwick, in August 1814, by Richard Newman the son, who afterwards made the marriage settlement. By this mortgage, which it had not been considered necessary to produce upon the former ejectment, all deeds were granted; and it contained a *general* declaration of the trust of all terms of years for the mortgagee. The assignment of the term from Carter of the 7th of October 1779, was delivered over to Markwick, and was contained in a schedule of title-deeds made at the time of the mortgage, and signed by Markwick. By a deed dated the 9th of September 1819, Newman, the trustee of the one thousand years term, declared that he would stand possessed of it in trust for Markwick, and to secure the mortgage-money due to him. It was argued on the part of the defendant that it would be inconvenient that one Judge should direct a jury to presume a surrender of the term, and another direct the contrary. In the mort-

(*t*) Doe v. Putland. See Bartlett v. Downes, 3 Barn. & Cress. 616.

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gage to Markwick there was no notice of any particular term, and no assignment was taken of the one thousand years term; Newman might therefore have parted with the term upon a new loan. The assignment in March 1819 was not at all for the benefit of Markwick; there was no acting upon the term from 1779 till 1819. No notice was taken of it in the marriage settlement. The learned Judge said, in charging the jury, that the facts were very different now to those proved on the former trial; and his present view was sanctioned by the suggestion in that very case. Here the deeds were handed over to the mortgagee before the settlement and conveyance, which accounts for the term not having been mentioned in those securities. The circumstance of the deed having been scheduled and handed over to Markwick shows that the term had not been surrendered. The (*)learned Judge directed the jury to find a verdict for the plaintiff. The jury found that the term was subsisting, and reserved any question of law.

In Trinity term 1820 the defendant moved for a new trial; the learned Judge who tried the cause re-stated the point, upon which he directed the jury, and observed that the case had excited a great deal of attention, and had occasioned the observations which have already been submitted to the learned reader(*u*). The Chief Baron said, that he should like to have the point argued on the presumption of surrender. From his habits in Westminster Hall, his Lordship added, he had travelled more than most men through the law relating to this case, and he did not think the doctrine of presumption a correct doctrine. It is a very serious point; and of late the doctrine has been carried to a very frightful extent. Mr. Baron Graham observed, that he had never suffered these

(*u*) They appeared at the time in the shape of a letter from the author to Mr. Butler.

presumptions, except in cases very strongly warranted, and where nothing was shown to the contrary. The Chief Baron added, that he never desired a jury to presume where he did not believe himself. The Court gave the defendant leave to argue the point upon the statute of frauds, upon a case to be stated(*x*). The point, therefore, as to the surrender of the term, was put at rest. The case upon the other point was prepared, but the suit has since been compromised, highly to the advantage of the Newmans.

The attention of Lord Chancellor Eldon was quickly drawn to the doctrine of the Court of King's Bench. In (*)the *Marquis of Townsend v. Bishop of Norwich*, on the 27th January 1820, his Lordship observed :—

The legal interest in the advowson is unquestionably in Mr. Ainge, for a term of years, which, as I understand, has been expressly assigned to attend the inheritance, I do not inquire whether there may have been intermediate transactions since the creation of the term, which might induce some people to think a surrender of it should be presumed, further than to remark, that having in days, which perhaps may be thought days of yore, passed about two years, by no means unprofitably, in the office of Mr. Duane, and during which I had frequent opportunities of knowing the opinions entertained by Mr. Booth, Mr. Fearne, and other eminent conveyancers of that day, I well know that they were in the habit of proceeding on notions relative to satisfied terms, which, notwithstanding some modern decisions, I would not advise conveyancers to depart from(*y*).

(*x*) It appears, therefore, that the presumption was made on the first ejectment, against the real facts and merits of the case as they ultimately appeared. This powerfully shows that such a presumption ought not to be made on light grounds.

(*y*) From Mr. Wilson's note.

Upon another occasion his Lordship observed : Formerly assignments were not considered necessary, because the old trustee would be a trustee for you, although you might not like him. It was never considered that the presumption of a surrender was to be made because some particular act had not been done. Lord Kenyon thought that some act must be done to presume a surrender ; but now it is said, that if no act is done, you may presume a surrender : I cannot go the length which I see some late cases go, where there is no proviso. They have raised the presumption from a transaction where they say the term would have been assigned if not surrendered. I say that the circumstance does not let in that presumption ; because the purchaser must know that the term will be held in trust for him, and he (*) may leave it where it is, to save the expense of taking out administration(z).

His Lordship again took occasion to observe, in *Hayes v. Bailey*, 15th March 1820 : There is now a modern doctrine of presuming surrenders. When I first came here, every old lawyer thought assignments of terms unnecessary ; and as to the principle, that the term would be presumed to be surrendered if it had not been assigned on marriages, &c. ; it was then thought that there was no occasion to assign, for if it had once been assigned to attend, the assignee will be a trustee for you. They then never thought it necessary to have it assigned on such occasions. I remember Mr. Lloyd used to say, that an old term was worth two inheritances. You see Lord Kenyon got as far as this before he would presume a surrender ; you must show that there had been some dealing with it ; but it seems to be the law now, that if you

(z) From the Author's note.

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show that there has been no dealing with it you are to presume it surrendered(*a*).

In the late case in the Exchequer, of *Deardon v. Lord Byron*, the Chief Baron again expressed his disapprobation of this doctrine of presumption(*b*).

Upon the appeal in the House of Lords, in *Cholmondley v. Clinton*(*c*), the Lord Chancellor, with a reference to a deed of the year 1704, by which a term of two hundred years was created, with a proviso for the cesser of the term, but which, as the circumstances upon which that term was to determine had not taken effect, remained a subsisting term, and was assigned in 1811, observed:—
“I would wish to call your Lordships’ most particular attention to this part of the case, because, unless I now (*)misunderstand, and unless I have misunderstood for a good many years, in which I have been laboriously, in different situations, discharging the duties which belong to the Profession of which I have the honor to be a member, the doctrine upon this subject, there arise out of the circumstances which I am about to mention many important observations bearing upon this case, with a great degree of importance, because bearing, unless I misunderstand the case very much, upon the titles to property in this kingdom. My Lords, this deed of 1704 provides, as I before stated, for the cesser of the term, that is, of the interest which the term creates. - Let me suppose for a moment, that there had been no such declaration with respect to the cesser of the term, or what comes to the same thing, that the state of things has not yet arisen in which the term is to cease, that term created in 1704, would, according to all the ideas that I ever had of the law of this country (I am speaking now of what

(*a*) From Mr. Jacob’s note.

(*b*) MS.

(*c*) MS. *Doe v. Cooke*, 6 Bing. 174 ; 3 Moo. & Payne, 411, S. C.

(*507)

would have been done twenty-five years ago, instead of speaking particularly of the present time,) be considered as a term which, whether the instrument that created it or not did so declare, would be attendant upon the inheritance when the ends and trusts of it were satisfied; that is, it would be considered as a term, where neither presumption that it was satisfied, nor presumption that it was surrendered, would at that period have been entertained, unless there had been some dealing with the term which would authorize a presumption either of the one nature or of the other, but it would be taken to be, what, in the language of those who are now no more, I have often heard it stated to be, the best part of a title, namely, that old term that could be got in to protect the inheritance. And I conceive that such a term, whether there was any intention that it should or should not attend the inheritance, would be a term held in trust to attend the inheritance, (*)protecting the equities of all who had equities during the existence of that term; all the estates, to a certain extent, that is, during the duration of the term, would be equitable estates, but protecting them all according to the due course, and order, and priority in which they existed, and according to their equities."

In giving judgment in the same case upon the hearing at the Rolls, Sir Thomas Plumer appeared also to be of opinion against the presumption in such cases(*d*).

Since the decision in *Doe v. Hilder* the point has been repeatedly debated before the different Masters in Chancery, upon objections taken by sellers to procure representations to terms of years, which, they insisted, ought to be presumed to have been surrendered; but the general and prevailing opinion has been that that doctrine cannot be maintained; and the Masters have acted upon that principle.

(*d*) 2 Jac. & Walk. 158.

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And finally, in *Aspinall v. Kempson*, upon a motion before the Lord Chancellor for a new trial, in which some gentleman at the common-law bar cited *Doe v. Hilder*, his Lordship observed, "It is not necessary to consider much the doctrine of presumption with reference to the present case, but the case of *Doe v. Hilder* having been alluded to, and having paid considerable attention to it, I have no hesitation in declaring that I would not have directed a jury to presume a surrender of the term in that case; and for the safety of the titles to the landed estates in this country, I think it right to declare that I do not concur in the doctrine laid down in that case(*e*)."

We may, therefore, be justified in considering the law to stand as it did before the decision in *Doe v. Hilder*; and conveyancers of course will follow the advice of the (*)Lord Chancellor, and not depart from the practice which they have hitherto followed.

In the recent case of *Doe v. Plowman*(*f*), where the term had been assigned to attend in 1789 upon a purchase, and in 1808 the purchaser settled the property upon her marriage, and afterwards devised the property under a power in the settlement, but neither in the marriage settlement nor of course in the will was any mention made of the term; it was held upon an ejectment by her heir-at-law that a surrender of the term could not be presumed. Lord Tenterden observed that the doctrine laid down in the cases above discussed he believed had been much questioned, and he inquired whether such a term as this was usually noticed in a marriage settlement, and upon receiving an answer in the negative, observed, "if that be so, there is no ground for presuming that this term which was assigned to attend the inheritance was ever surrendered."

(*e*) L. I. Hall, 5 Dec. 1821, from Mr. Walker's note.

(*f*) 2 Barn. & Adolph. 573.

The Vice-Chancellor, Sir John Leach, in two late cases upon specific performance, as between a seller and a purchaser, presumed a term to be surrendered which had *not* been assigned to attend the inheritance, and which for a long period had not been disturbed. The first case was *Emery v. Growcock*(*g*). The other case was *ex parte Holman*(*h*), where it appeared by the abstract of the title delivered to the purchaser, that, by indenture bearing date the 24th of December 1735, and made between Thomas Baker of the one part, and John Marsh of the other part, the said Thomas Baker did grant and demise, amongst other hereditaments, the messuage and premises in question unto the said John Marsh, his executors, administrators and assigns, for the term of five hundred years, (*)subject to redemption on payment by the said Thomas Baker, his heirs, executors, administrators and assigns, unto the said John Marsh, his executors, administrators or assigns, of the sum of 205*l.* on a certain day therein mentioned, that the said sum was not paid accordingly, but that the same with all interest was paid to the executor of the said John Marsh on the 6th day of October 1750, as appeared by a receipt indorsed on the said indenture, but no assignment or surrender of the said premises comprised in the said term was ever made and executed, and therefore the purchaser insisted that the sellers should at their own expense discover the personal representatives of the said John Marsh, and procure an assignment from them of the said term to a trustee for the purchaser to attend the inheritance.

The Master to whom the title was referred was of opinion that the term of five hundred years was outstanding, and was then vested in the personal representative

(*g*) Mar. 1821, MS. 6 Madd. 54.

(*h*) 24 July, 1821, MS. ; and in *Townsend v. Champernown*, 1 Yo. & Jerv. 538.

(*510)

or representatives of John Marsh the termor, but it did not appear by any evidence before him who was or were such personal representative or representatives; and the Master was of opinion that it was expedient and necessary that the said term should be assigned to a trustee for the purchaser, and that the expense of deducing the title thereto, and of procuring the said term to be so assigned, should be borne and paid by the vendors.

In an intermediate deed, dated in July 1749, the term was noticed, but in no other deed was it mentioned; and there were three conveyances of the fee upon sales, one in 1784, another in 1791, and the other in 1792. The Vice-Chancellor was of opinion that a surrender of the term must be presumed.

V. The importance of obtaining an assignment of all outstanding terms cannot be too strongly impressed on (*)purchasers. If a purchaser has no notice, and happens to take a defective conveyance of the inheritance, defective either by reason of some prior conveyance, or of some prior charge or incumbrance, and if he also takes an assignment of the term to a trustee for him, or to himself, where he takes the conveyance of the inheritance to his trustee, in both these cases he shall have the benefit of the term to protect him; that is, he may make use of the legal estate of the term to defend his possession, or, if he has lost the possession, to recover it at common law, notwithstanding that his adversary may at law have the strict title to the inheritance(i)(246).

Lord Hardwicke was of opinion that the protection arising from a term of years, assigned to a trustee for a purchaser, should extend generally to all estates, charges

(i) *Willoughby v. Willoughby*, 1 Term Rep. 763, *per* Lord Hardwicke; and see For. 69.

(246) See *Williamson v. Gordon's Exrs.* 5 Munf. 257.

and incumbrances, created intermediate between the raising of the term and the purchase(*j*). And this doctrine, unqualified as it is, seems correct. For as the term will prevail over a strict title to the inheritance, it will of course be a protection against judgments, mortgages, and all other incumbrances and estates less than a fee; and it may, in like manner, be used as a shield against an act(*k*), or commission(*l*) of bankruptcy.

In the late case of the *King v. Smith*(*m*), however, the Court of Exchequer held that a term of years, which had been assigned to a trustee for the crown debtor(*n*), would not protect a purchaser against crown debts, although he purchased *bona fide* and without notice(*l*). This point (*) had previously been considered by most of the leading characters in the Profession, some of whom have since filled the highest judicial situations; and the general opinion of the Profession appears to have been, that a purchaser might protect himself against crown debts, by a legal term of years created previously to the right of the crown attaching on the estates, where he had not notice,

(*j*) See 1 Term Rep. 768.

(*k*) *Collett v. De Gols*, For. 65.

(*l*) *Hithcox v. Sedgwick*, 2 Vern. 156, reversed in *Dom. Proc.* See *post.* c. 17, this point considered.

(*m*) Excheq. 2d March, 1804, MS. Appendix, No. 17.

(*n*) See 13 Price, 656.

(I) It has been determined that in the case of a purchase for a valuable consideration, without notice and without fraud or covin, from a *simple contract* debtor of the king, the lands are not bound by such simple contract debt. *The King v. Smith*, 1 Wight. 34. In that case, the general words in the statute of 13 Elizabeth, c. 4, received a limited and proper construction. In *Wild v. Fort*, 4 Taunt. 334, in which it was not necessary to decide the point, the rule was laid down with apparently too much latitude, that every person who has received money belonging to the crown, every accountant of the crown for money of the crown received, falls within the act. See *Casberd v. Ward*, 6 Price, 411.

(*512)

express or implied, of the debt due to the crown, or of the vendor being an accountant to the crown. They relied on the analogy between this case and the general rule respecting judgments and recognizances, against which a purchaser may protect himself by an outstanding legal estate, unless he had notice of them previously to completing his purchase. The late Lord Kenyon, in an opinion on this point, treated the right of the crown as not superior to that of a subject. Indeed, the point may fairly be said to have received what was tantamount to a judicial decision, previously to the determination of the Court of Exchequer. When Mansfield, Chief Justice of the Common Pleas, was Solicitor-general, he gave an opinion in favor of the right of the crown to extend lands in the hands of a mortgagee, although the legal estate had never vested in the mortgagor, but had been conveyed to the mortgagee by the trustees in whom it had been vested in trust for the mortgagor. The question underwent great consideration, and it was discovered that there was an old term of years, to the benefit of which the mortgagee was clearly entitled in preference to any (*)other person, although it was not actually assigned to a trustee for him. The case was again laid before the Solicitor-general, who then wrote an opinion that the title of the mortgagee would be preferred to that of the crown. He stated, that upon a short inquiry before he wrote his former opinion, it had been represented to him, that estates held in trust for a debtor of the crown were usually seized under extents, and were considered as bound by his debts in the same manner as those of which he was legally seized. He had since desired a further search to be made, and was then informed that no instances were to be found in which a trust-estate of such debtor fairly parted with to a purchaser without notice had been deemed to be liable to the debts of the crown, and

in consequence of this information his opinion then inclined in favor of the mortgagee. And he gave a similar opinion on this point in the year 1801, so that he had not seen any reason to alter his opinion after a lapse of nearly twenty years.

The principal grounds of the determination in the *King v. Smith* were three :— 1st, that the lands of a debtor to the crown might be extended into whatever hands they might have been aliened, subsequently to their becoming liable to the crown ; 2dly, that the estates of which the debtor was *cestui que trust* might be extended ; and 3dly, the decision in the case of the Attorney-general *v. Sands*(o). The two first positions of the Court may be admitted to be law, without, as it should seem, at the same time admitting that a purchaser cannot protect himself against the crown by an outstanding legal estate. Indeed it was the third ground upon which the Court principally relied, and built their decree.

The determination in the case of the Attorney-general (*)*v. Sands* was, that the trust of a term attendant on the inheritance was not forfeited by the felony of the *cestui que trust*, because it was no more than an accessory to the inheritance, which was not forfeited. In the *King v. Smith*, the Court of Exchequer thought that the converse of this case must be taken to be true. The term was not forfeited, because the inheritance was not forfeited ; but if the inheritance had been forfeited, the term must have been forfeited. The case of the Attorney-general *v. Sands* was decided in a court of equity, and appears wholly to depend upon the rules of equity as to attendant terms ; and on the like principle, it may be thought that the same Judges would have denied relief against a purchaser in a case similar to that of the *King v. Smith* ; and that no such relief could at this day be granted. If

(o) Hard. 2 Freem. 3 Cha. Rep.

(*514)

any remedy, therefore, lies against the purchaser, it must be at law. Now at law the term in the trustee is a term in gross. A legal title, prior to the right of the crown, must prevail at law; and the Court ought not to advert to the trust, only for the purpose of taking the protection of the term from the *bona fide* object of the trust, for even the *arts* of the law in introducing collateral warranties, discontinuances, and non-claims *to protect the possession and strengthen the rights of purchasers*, have been the subject of commendation from the great Lord Nottingham; and it is admitted that if the term be in gross, an assignment before any actual extent will stand good against the king's debt(*p*). Lord Hardwicke's decision in *Willoughby v. Willoughby* is an elaborate performance, and was certainly pronounced after great consideration. Every point was adverted to, and yet his Lordship lays the rule down generally, that a purchaser may protect himself against all mesne incumbrances by a (*)prior legal term, and does not except the case of the crown. And in pronouncing judgment in the *Attorney-general v. Sands*, the Chief Baron observed, that the term was only kept on foot to avoid incumbrances which might affect the inheritance; and yet, although he was discussing the rights of the crown, he did not seem to consider that the term would not prevail over crown debts. It is not denied, that in general where a term is attendant on the inheritance, if the king extends the inheritance he shall have a right to the term(*q*); but the question here turns upon what, it is conceived, ought to form an exception to that rule, viz. a purchase by the person claiming the benefit of the term *bona fide*, and without notice of the claim of the crown.

It remains only to observe, that in this commercial

(*p*) 2 Vern. 390.

(*q*) See the 2d resolution in *Nicholls v. How*, 2 Vern. 389.

country, any decision which tends to clog the free alienation of property, and to render the titles of fair purchasers insecure, cannot but be productive of the most serious consequences, and well demands the interference of the legislature, if the law is too well settled to be over-ruled.

In a still later case(*r*), in which the case of *King v. Smith* appears to have been forgotten, where a man having agreed before marriage to purchase and settle estates, entered into bonds to the crown, and then made a purchase, and afterwards settled the estate according to the articles, it was held that a mortgage term assigned to attend upon the purchase did not protect the inheritance against the crown debt, *because the settlement was voluntary*. There was no covenant in the articles which specifically bound the lands. The assignment of the term therefore could not, it was held, defeat the right of the crown.

(*) But where the term has never been assigned to attend for the crown debtor, it will not be affected by the claim of the crown in the hands of a trustee for a *bona fide* purchaser. Therefore, where upon a purchase a term of 1,000 years was limited to the seller to secure a portion of the purchase-money and subject to the term, the fee was limited to the purchaser; the mortgage was not paid off by the purchaser, but he sold the property, and the second purchaser paid off the mortgage, and took an assignment of the term to a trustee for himself to attend the inheritance: it was held that the term was not bound by the crown debt of the first purchaser(*s*).

Mr. Butler justly observes, that “a term should never be relied on, unless proof can be obtained easily, and at a small expense, of the instruments and acts in law, which

(*r*) *Rex v. St. John*, 2 Price, 317. See *Rex v. Hollier*, 2 Price, 394.

(*s*) *Rex v. Lamb*, 13 Price, 649; *M'Clel.* 402, S. C.

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must be proved to establish the creation and deduction of the term. It should also be ascertained, that its situation is such as enables the party entitled to it, to avail himself of it in ejectment(*t*).” And to enable the purchaser to avail himself of the term, it is indispensably necessary that he should not have notice, either express or implied, of the incumbrance or title against which he is desirous of using the term as a protection. Mr. Powell, indeed, although he admits that terms, the purposes of whose creation are answered, and which have been expressly assigned to attend the inheritance, will not be any protection to a purchaser of the inheritance who had notice of any judgments, &c. yet contends, that where a purchaser of the inheritance obtains a term in gross, the purposes of whose creation were not answered at the time of the purchase(*I*), or a (*)term the purposes of whose creation were answered, but which had not been expressly assigned to attend the inheritance, but merely waited upon the freehold by construction of equity, such purchaser can defend his possession by the term, although he had notice of any intervening judgment.

This is an attempt to establish a *new* distinction between a term assigned upon an express trust to attend the inheritance, and a term attendant by the construction of equity, an attempt which Lord Hardwicke appears to have overruled in the case of *Willoughby v. Willoughby*; and it would be very imprudent for a purchaser of an estate in any case to rely on a term of years, as a protection against

(*t*) N. (1), s. 13, to Co. Litt. 290 b.

(*I*) In this case the purchaser could of course defend himself against any subsequent incumbrancer to the extent of the subsisting charge on the term at the time of the purchase. It has, indeed, been thought that if there are two mortgagees, and the first in point of charge buy the inheritance, he lets in the other on the estate discharged of the prior mortgage. See, however, *Kennedy v. Daly*, 1 Scho. & Lef. 355.

any incumbrance, of which he has express or implied notice.

It is, however, settled by a series of authorities(*u*), (*)that a purchaser may protect himself against the dower of the vendor's wife, by a term created previously to her right of dower attaching on the estate, although he had actual notice of the marriage, and of her title to dower; a protection, as we shall hereafter see(*x*), to which a purchaser with notice is not entitled in any other instance, or against any other person(*I*).

The term, however, must be actually assigned to a trustee for the purchaser, if it is intended to be used as a bar to the wife's dower(*y*)(247); because, by the rules of

(*u*) *Lady Radnor or Bodmin v. Rotherham or Vendebendy*, Prec. Cha. 65; 1 Vern. 170. 356; 2 Cha. Ca. 172; Show. P. C. 69; *Brown v. Gibbs*, *Wray v. Williams*, *Dudley v. Dudley*, Prec. Cha. 97. 151. 241; and see *Banks v. Sutton*, 2 P. Wms. 700 (*I*); *Hill v. Adams*, or *Swannock v. Lyford*, 2 Atk. 208; Ambl. 6; *Butler's n. (1) to Co. Litt.* 208 a; *Wynn v. Williams*, 5 Ves. jun. 130; *D'Arcy v. Blake*, 2 Scho. & Lef. 387; and see *supra*, p. 358.

(*x*) *Infra*, ch. 16.

(*y*) See *Maundrell v. Maundrell*, 7 Ves. jun. 567; 10 Ves. jun. 246, particularly the close of the judgment.

(*I*) Note, this case is generally thought to be over-ruled, but Mr. Powell has endeavored to show, that it is not affected by later decisions. See 2 Mort. 731, 4th edit.; and in a manuscript note of the *Attorney-general v. Scott*, *penes auctorem* (For. 138,) Lord Talbot is reported to have said, that the reason of the decree in *Banks v. Sutton* was different, for there the direction of the will was, that the legal estate should be conveyed to Sutton, and the wife married him on the expectation of that estate, and it was a fraud in the husband not to call for the settlement. See a fuller note of this case than that which is published, Appendix, No. 18. In the late case of *D'Arcy v. Blake*, 2 Scho. & Lef. 387, it was said by the Court, that what was thrown out by Sir Joseph Jekyll, in *Banks v. Sutton*, had been long over-ruled.

(*I*) All these observations upon dower apply to cases *not* within the late act, for as to cases within the act, the husband alone can defeat the wife's right of dower. Vide *supra*, ch. 7.

(247) See *Milledge v. Lamar*, 4 Des. 617.

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equity, every term attendant on the inheritance follows it in its various modifications, and in the charges and incumbrances which attach on it, or are created in it(z); and therefore, upon the marriage of a man seised of lands of inheritance, in which there is a term outstanding, a right of dower attaches on the inheritance, by the act of law, and in equity the term is equally bound with the inheritance; and as the claim of a purchaser is not more favored in equity than that of a dowress, a purchaser will not be entitled to the benefit of an outstanding term, to the prejudice and in exclusion of a dowress. Indeed the decision(a), that a purchaser could defend himself against a claim of dower by a term assigned to a trustee for him, proceeded not on principle, but on the universal practice and opinion of conveyancers in that respect; for(b) the Court of Chancery and House of Lords were of opinion, that if they were not to permit that to be so, it would be to (*)overturn the general rule which had been established and practised by many titles to estates, and tend to make such titles precarious for the future. The same reason does not apply where the purchaser neglects to take an assignment of the term; it having always been the general understanding and opinion of conveyancers, that to protect against dower, the term must be actually assigned to a trustee for the purchaser.

In *Swannock v. Lifford*(c), Lord Hardwicke appears to have considered it clear, and it was admitted at the bar, that if a man before marriage conveys his estate privately, without the knowledge of his wife, to trustees, in trust for

(z) See *Charlton v. Low*, 2 P. Wms. 328.

(a) *Lady Radnor v. Vendebendy*, Show. P. C. 69.

(b) *Per* Lord Hardwicke. See Butler's n. *ubi sup.*

(c) Butler's n.(1) to Co. Litt. 208 a; and see 2 P. Wms. 709. Note, in the case of *Bottomley v. Lord Fairfax*, Prec. Cha. 336, the Court did not advert to a conveyance made *immediately* before marriage.

himself and his heirs in fee, that will prevent dower; and it appears that this was practised by a reverend Judge of equity, Mr. Serjeant Maynard, who made a lease to his servant the day before his last marriage(*d*). But the counsel who argued for the respondent in *Radnor v. Vendebandy*, before the House of Lords, seems to have admitted, that if a husband, *just before marriage*, make a long lease on purpose to prevent dower, and the woman *expecting the privileges which the common law gives to women married*, survive him, equity may interpose; and this doctrine has been distinctly recognised by a learned Judge and author(*e*). And as this opinion may be supported by weighty reasons, a purchaser cannot, it is conceived, be advised to rely upon a legal estate, created in fraud of the rights of marriage, as a protection against the wife's dower(*f*) (248).

It hath been just observed, that by the rules of equity (*)every term attendant on the inheritance follows it in its various modifications, and in the charges and incumbrances which attach on it, or are created in it. Now it is a consequence of this rule, that whenever the inheritance is conveyed or charged, the trustee of the term becomes a trustee for the person in whose favor the estate is conveyed or charged, to the extent of his claims on the estate. If the trustee have notice of such purchase or incumbrance, his conscience will be affected; and if he assign the term to a subsequent purchaser, or

(*d*) See *Show. P. C.* 71.

(*e*) *Gilb. Lex Prætor.* 267.

(*f*) As to settlements by women previously to marriage, in derogation of the marital rights, see *Countess of Strathmore v. Bowes*, 2 Bro. C. C. 345, 1 Ves. jun. 22. and the cases there cited, which may be thought, in some measure, to apply to the point under consideration.

(248) As to marital rights, See *Ward v. Wilson*, 1 Des. 401. *Garner v. Garner's Exrs.* 1 Des. 437. *Taylor v. Heriot*, 4 Des. 227.

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incumbrancer, it would be a breach of trust, and he would in equity be decreed to make satisfaction(*g*). A trustee, therefore, of a term to attend the inheritance, cannot be advised to assign the term to *any* purchaser or incumbrancer, unless he is satisfied that his immediate *cestui que use* has not done any prior act to charge the inheritance(*h*).

As a trustee ought to be satisfied, that the person by whose direction the term is assigned, is the person entitled to require the assignment, it is usual, by way of authority to the trustee, to recite all the instruments, &c. affecting the fee, from the time the term was created to the date of the deed of assignment; and this is very commonly done, even where the term has been assigned to attend the inheritance. In the latter case, however, such a recital is both unnecessary and improper; for the trustee can only be affected by the acts of his own *cestui que trust*; and therefore, where a term has been actually assigned to attend the inheritance, on a future assignment of it, it is only necessary to recite the deed creating (*)the term, that by divers conveyances and assurances the fee became vested in *A.* (the person requiring the assignment); and that by divers assignments and acts in law, and ultimately by such a deed (the assignment to attend), the term became vested in the trustee, in trust for *A.*; and then any instruments affecting the fee, since the last assignment of the term, to attend the inheritance, should be recited.

VI. Before we quit this very interesting subject, let us inquire in what cases a term of years will attend the

(*g*) 1 Term Rep. 771.

(*h*) See 1 Pow. Mort. 507, 508, 4th edit.; Evans v. Bicknell, 6 Ves. jun. 174. Ex parte Knott, 11 Ves. jun. 609.

inheritance, without an express declaration of trust for that purpose(*i*).

First, then, it is a general rule, that whenever a term would merge in the inheritance if united, it shall attend, if in a different person, without an express declaration, by implication of law founded on the statute of frauds(*k*). And the custom of London shall not prevail over this operation of law(*l*).

Therefore, where a person purchases the inheritance in his own name, and takes an assignment of a term in the name of a trustee(*m*); or takes a conveyance of the fee in the name of a trustee, and an assignment of a term in his own name(*n*); in both these cases the term attends the inheritance, unless there be an express declaration to the (*)contrary, whether the term be purchased or obtained before or after the purchase of the fee. And in general there is no difference between an assignment of a term to a trustee, in trust to attend the inheritance, and an assignment to a trustee, in trust for the purchaser, his executors, administrators and assigns(*o*).

(*i*) See an admirable opinion of Mr. Fearne's respecting terms of years, 2 Coll. Jur. 297. Mr. Powell has in the last edition of his Treatise on Mortgages inserted this opinion without acknowledgment. See 1 Mort. 483—489.

(*k*) See 1 Bro. C. C. 70.

(*l*) *Greene v. Lambert*, 1 Vern. 2, cited; *Dowse v. Derivall*, *ibid.* 104; 2 Vern. 57; Reg. Lib. A. 1683, fol. 283. It is said in the decree, that the lease and conveyance were in law one conveyance; *Rich v. Rich*, 2 Cha. Ca. 160.

(*m*) *Tiffin v. Tiffin*, 1 Vern. 1; 2 Cha. Ca. 49. 55; *Whitchurch v. Whitchurch*, 2 P. Wms. 236; 9 Mod. 124; Gilb. Eq. Rep. 168; *Goodright v. Sales*, 2 Wils. 829.

(*n*) *North v. Langton*, 2 Cha. Ca. 156; *Dowse v. Derivall*, 1 Vern. 104; *Attorney-general v. Sands*, 3 Cha. Rep. 19.

(*o*) *Best v. Stamford*, Prec. Cha. 252; *Tiffin v. Tiffin*, 1 Vern. 1; *Holt v. Holt*, 1 P. Wms. 374, cited; *Pitt v. Cholmondley*, Chancery, 9 Nov. 1751, MS.

(*522)

So the same rule prevails where a man possessed of a term for years contracts for the inheritance, for the vendor stands seized in trust for the purchaser from the time of the contract(*p*).

And where, by reason of an intermediate term outstanding, a term cannot merge, although vested in the purchaser together with the fee, yet if the purchaser be entitled to such outstanding term, even the term vested in the purchaser, and which cannot merge, shall attend the inheritance, without any express declaration for that purpose(*q*).

And even if the purchaser cannot obtain an assignment of the whole term, yet, if a nominal reversion only, as a reversion of a few days, be left outstanding, so much of the term as is assigned to a trustee for the purchaser will be deemed attendant on the inheritance, without any express declaration for that purpose. But where the term is subject to rents or charges in favor of other persons, whereby the purchaser has not *substantially* the whole *beneficial* interest in the estate, there an express declaration is necessary to make the term attendant. The mere intent of the purchaser to purchase the whole interest, (*)and that the term should attend the inheritance, will not vary the case.

The two last propositions appear to be established by the case of *Scot v. Fenhoulllet*(*r*). From the imperfect statement of the facts in this case, it is difficult to understand the ground of Lord Thurlow's decision ; and it has been generally thought that the decree turned on the

(*p*) *Capel v. Girdler*, Rolls, 16th March 1804, MS. ; 9 Ves. jun. 509 ; *Cooke v. Cooke*, 2 Atk. 67. *Vide supra*, ch. 4.

(*q*) *Whitchurch v. Whitchurch*, 2 P. Wms. 236 ; 9 Mod. 124 ; Gilb. Eq. Rep. 168 ; and see 1 Bro. C. C. 170.

(*r*) 1 Bro. C. C. 6. 9.

reversion, which the purchaser could not get in(s). The facts, as stated in Lord Thurlow's judgment, on the rehearing, reported in Brown, are shortly these: Mrs. Rudger was seised in fee of the estate, subject to two terms of years, upon which it should seem small rents were reserved; which terms were vested in trustees in trust for Mrs. Rudger for life, and for raising certain annual and gross sums of money. Sir Andrew Chadwick purchased of Mrs. Rudger the fee-simple estate, and so much of the terms as related to it; and the trustees executed their power by granting a derivative lease to trustees for Sir Andrew, with a nominal reversion (eleven days) to themselves. Lord Thurlow admitted, that Sir Andrew meant to purchase the whole interest, and that his intent was, that the terms should attend the inheritance. If they did attend the inheritance in this case, it must, he said, be by implication of law, as there was no express declaration; and, after showing that the case of *Whitchurch v. Whitchurch*(t) did not apply to the case before him, because that there no interest was outstanding, except in form, he added, "Sir Andrew Chadwick might have given these terms to a stranger, and if the inheritance descended, the heir at law might demand the rents reserved by the leases. It is said to be extremely plain, that Sir Andrew Chadwick meant to consolidate (*)the interests: this is begging the question. It is true he meant to take the largest interest he could, but by no means apparent that he meant to consolidate the interests. *I lay no stress on the days of the reversion, for it was meant only as a nominal reversion; they did not mean to reserve a substantial interest.* It would be necessary there should be an express trust to make this attendant on the

(s) See *Capel v. Girdler*, MS. and 9 Ves. jun. 509; 1 Cruise's Dig. 513, s. 17, and the marginal abstract of the case in Brown.

(t) *Supra*.

(*524)

inheritance ; the transaction does not supply a necessary construction of law. It is a very nice point, and a very new one ; whether the intent to purchase the whole interest is sufficient to make the term attendant on the inheritance. *The impossibility he was under of purchasing the whole, rendered an express declaration necessary to make it attend the inheritance.*" Now, at first sight, it certainly does seem impossible to reconcile those parts of the judgment which are printed in italics. But it appears by an opinion of Mr. Fearne's^(u), in consequence of which the cause was reheard, that rents were reserved by the leases granted by the trustees to Sir Andrew Chadwick, and the usual covenants were entered into by him, and the trustees were restrained to that mode of making a title by their trust, which required a reservation of rent, and the usual covenants.

This fact at once reconciles every part of the judgment. Lord Thurlow was of opinion, that the reversion of itself was immaterial, but that the rents reserved by the leases rendered an express declaration necessary to make the terms attend the inheritance. And Mr. Fearne was also of opinion, that the terms would not be attendant, if there was any intervening *beneficial* interest in any third person, to divide the ownership of the term from the inheritance. But as he was told that the rents reserved to the trustees upon the terms were afterwards purchased by Sir Andrew, (*)he thought the terms did attend the inheritance, although there was not any express declaration for that purpose ; and he expressly delivered his opinion, subject to this fact, which he had learned from verbal information only. By Lord Thurlow's decree on the rehearing, it appears clearly that the rents were not purchased, and consequently Mr. Fearne was misinformed in this respect.

Mr. Fearne's opinion on this point is very strongly

(u) 2 Collect. Jurid. 297. No. 6.

marked ; for he thought, that if there was any intervening outstanding *interest* between the ownership of the term and the inheritance, even an express declaration of trust could not make the terms attendant. This, however, was going too far ; and Lord Thurlow, who had probably seen this opinion, addressing himself to the cases in which a term would attend the inheritance, said, that might be by two ways : first, by express declaration ; and then, whether the term would or would not merge, and whether the reversion be real or only nominal, it must be attendant on the inheritance.

We have seen that where a term attends the inheritance without any express declaration, it is by implication of law ; and this implication, like all implications of law, or equitable presumptions, may be rebutted by even a parol declaration of the person in whose favor the implication or presumption is made(*x*).

VII. A term for years attendant on the inheritance, whether by express declaration or by implication, is governed by the same rules as the inheritance itself is subject to. Therefore it will not be forfeited by the felony of the owner of the inheritance(*y*) ; but if the inheritance escheat, the term will go with it(*z*).

(*) So it seems, that such a term cannot pass by a will not executed according to the statute of frauds(*a*). But it appears to have been thought, and the distinction, it is conceived, may be supported on solid grounds, that where a term attends the inheritance merely by operation of law,

(*x*) See *post.* ch. 15.

(*y*) *Attorney-general v. Sands*, 3 Cha. Rep. 19 ; Hard. 488.

(*z*) *Thrupton v. Attorney-general*, 1 Vern. 340, 357.

(*a*) *Tiffin v. Tiffin*, 2 Cha. Ca. p. 49, 55 ; 2 Freem. 66 ; *Whitchurch v. Whitchurch*, Gilb. Eq. Rep. 168 ; *Villiers v. Villiers*, 2 Atk. 71. *Note*, *Nourse v. Yarworth*, Finch, 155, was before the statute of frauds.

(*526)

the owner may *expressly* bequeath it by a will not executed with the solemnities required by the statute(*b*).

It is clear, that where the deviser intended the inheritance to pass, but, by reason of the informality of the will, it descends to the heir, the term shall not go to the devisee, but shall follow the inheritance in its devolution on the heir(*c*).

So where a termor for years, having contracted for the fee, made his will, whereby, after reciting that he had purchased the term, and contracted for the fee, a conveyance of which could not then be obtained, he declared, that when a conveyance could be had, the estate should be settled to the uses mentioned in his will, and directed that the remainder of the term should remain and be attendant on the inheritance. The person who contracted to sell the fee was not owner of it, and the owner sold it to another person. Sir Joseph Jekyll held, that the testator intended to pass the inheritance; and although he had it not, yet the term could not pass by the will, as such a construction would be contrary to the testator's intention(*d*).

(*)As the inheritance of an estate is not liable to simple contract debts, it follows, on the principle before noticed, that a term attendant on the inheritance is not personal assets for the payment of debts(*e*), but it is generally stated that such a term is *real* assets:—This is, however,

(*b*) See 9 Mod. 127; and see 2 Collect. Jurid. 276.

(*c*) Cases cited *ante*, n. (*a*).

(*d*) Bret v. Sawbridge, 3 Bro. P. C. 141, Tom. ed.; and see Fearn's Ex. Dev. by Powell, 145, n. (*a*). S. C. Appendix, No. 19. This note of the case will, I hope, be acceptable to the reader. It contains a concise statement of the facts, and sir Joseph Jekyll's judgment, which is, I believe, not in print, and comprises some interesting remarks on executory bequests of terms.

(*e*) Thruxton v. Attorney-general, 1 Vern. 340; Tiffin v. Tiffin, 1 Vern. 1.

a very incorrect expression: the term itself is not real assets, but is merely attendant on the inheritance, which is. In *Chapman v. Bond*(*f*), it appears to have been thought, that although the term was in a trustee, yet if it attended the inheritance by construction of equity only, it should be assets in equity for payment of the owner's debts, in like manner as a term taken in his own name would be assets at law. But this opinion is clearly overruled; and where a term is in a trustee, the same rules prevail on this point, whether the term be attendant by express declaration or not(*g*). In one case it is made a query, whether if tenant in tail contract debts by bond and die, and it can be made to appear that some of his ancestors, who bought the estate, found an old mortgage upon it for a long term of years, which was kept on foot to wait upon the freehold and inheritance, such lease in equity would not be assets in the hands of the heir in tail, for it is equity only makes such leases descend, and it is the highest equity, that a man's debts should be paid(*h*). There is not, however, the least foundation for this doubt. Equity, in this respect, follows the law, and at law the estate is not bound.

But where the inheritance is in trustees, and the owner has a term in his own name, and dies indebted, the term, although limited to attend the inheritance, will be liable (*)to debts, for it is assets at law(*i*); and equity here follows the law(*k*), and therefore a purchaser should never

(*f*) 1 Vern. 188.

(*g*) *Baden v. Earl of Pembroke*, 2 Vern. 52, 213; 2 Trea. Eq. c. 4, s. 6.

(*h*) Anon. 11 Mod. p. 5.

(*i*) *Thruxton v. Attorney-general*, *ubi sup.*; *Chapman v. Bond*, 1 Vern. 188; *Attorney-general v. Sands*, Hard. 488.

(*k*) See 2 Cha. Ca. 49; *Earl of Pembroke's case*, 9 Mod. 125, cited.

(*528)

take the term in his own name, if he do not wish his estate to be personal assets.

If after the death of a person who has taken an assignment of a term in his own name, and a conveyance of the inheritance in the name of a trustee, his personal representative assign the term to attend the inheritance, it will cease to be assets at law; and the creditors or legatees will be entitled to satisfaction against the personal representative, as for a *devastavit*; and may, it should seem, even follow the term in equity, unless as against a *bona fide* purchaser without notice, against whom the term will not be severed or disannexed from the inheritance in favor of the creditors or legatees, although the purchaser did not take an assignment of the term, or was even not aware of its existence⁽¹⁾(249).

But these distinctions will, as to persons who have died since the 29th August 1833, or who shall hereafter die seised of freehold, customaryhold or copyhold estates, in a great measure cease to exist; for the 3 & 4 W. 4, c. 104, has made all such estates assets for the payment of even simple contract debts.



(*)SECTION III.

Of Attested Copies.



THUS have we taken a cursory view of the doctrine respecting terms of years, a learning which demands the practical conveyancer's peculiar attention; and we are

(1) *Charlton v. Low*, 3 P. Wms. 32.

(249) See *The People v. Pleas*, and *Clark*, 2 Johns. Cas. 376.

now to consider in what cases a purchaser is entitled to attested copies of the title-deeds.

If a purchaser cannot obtain the title-deeds, he is, as we have already seen, entitled to attested copies of them at the expense of the vendor, unless there be an express stipulation to the contrary(*m*); and although he may not be entitled to the possession of the deeds, yet he has a right to inspect them, and the vendor must produce them for that purpose(*n*).

But a purchaser is not entitled to attested copies of instruments on record.

This was decided in the case of *Campbell v. Campbell*(*o*), where the Master, in taxing costs incurred by the sale of considerable estates, disallowed the charges for attested copies of deeds and documents upon record; and upon exceptions to his report on that account coming on, the Master of the Rolls over-ruled them, and held that a purchaser was not entitled to such copies at the expense of the vendor.

In some cases, however, a purchaser can obtain attested copies even of instruments on record. For a purchaser is entitled to examine the abstract with the original title-deeds, or with attested copies of them; and, therefore, if a vendor has not the instrument itself, and cannot (*)obtain it, he is bound to procure an attested copy of it, to enable the purchaser to ascertain that the abstract is correct; and when it is obtained, the purchaser is of course entitled to it on the completion of the purchase; unless, indeed, the vendor retains other estates holden under the same title.

In a case before Lord Rosslyn, where there was an

(*m*) *Dare v. Tucker*, 6 Ves. jun. 460; *Berry v. Young*, 2 Esp. Ca. 640, n.

(*n*) *Berry v. Young*, *ubi sup.*

(*o*) Rolls sittings after ——— Term, 1793, MS.

(*530)

agreement that the vendor should produce the original title-deeds, his Lordship construed it, not only as an engagement to produce the title-deeds, but as a negative stipulation, that he should not give attested copies. This was certainly presuming a great deal. Lord Eldon has since thought that the pressure of the stamp duties led to that decision(*p*); and, it is probable, that a similar case would now receive a different determination.

In a recent case, Lord Eldon compelled the vendor, at his own expense, to furnish attested copies, the purchaser having had no intimation that he could not have the deed. For, his Lordship said, if he had notice that he was not to have them, he would regulate his bidding accordingly; conceiving that he was to bear the expense of procuring copies(*q*). From this, it may be inferred, that notice that the purchaser cannot have the deeds is tantamount to a stipulation, that he shall not be furnished with attested copies at the seller's expense. The general practice of the profession, founded on the decided cases, is, that the seller, in the absence of an express stipulation to the contrary, is bound, at his own expense, to furnish the purchaser with attested copies: and Lord Eldon does not appear to have intended to establish a new rule.

Where a purchaser cannot claim the title-deeds, it is of great importance to him to obtain attested copies of them. But attested copies are not of themselves sufficient security (*) to a purchaser,—they are indeed mere waste paper against strangers, and cannot be used upon an ejectment, unless, perhaps, as between the parties themselves. Therefore, in order to enable a purchaser to effectually manifest and defend his title and possession, he is also entitled, at the expense of the vendor, to a covenant to produce the deeds themselves, at the expense of the pur-

(*p*) See 6 Ves. jun. 460.

(*q*) Boughton v. Jewell, 15 Ves. jun. 176.

chaser(*r*); which should, in most cases, be carried into effect by a separate deed. And where a vendor retains the deed by which the estate he is selling was conveyed to him (which is mostly the case when it relates to other estates), it seems advisable for the purchaser to require a memorandum of his purchase to be indorsed on such deed.

And where the title-deeds cannot be delivered, assignees must, like any other vendor, give attested copies of them at the expense of the estate, but their covenant for the production of the deeds should be confined to the time of their continuance as assignees(*s*). If, however, the covenant is so confined, the purchaser should have some security that the person who shall ultimately become entitled to the custody of the deeds will covenant for their production. The proper course seems to be for the assignees' covenant to be made determinable in case they shall procure the person to whom they shall deliver the deeds to enter into a similar covenant with the purchaser.

It may here be remarked, that although a purchaser of part of an estate has taken a covenant for the production of the deeds, yet, if they afterwards come into his possession by accident, no person can recover them from him who has not a better right to them than he has(*t*).

And if a purchaser without fraud leave the title-deeds (*) in the hands of the seller, yet he may recover them in trover from the holder of them, although the latter may have advanced money upon them to the seller, and he is not bound to pay the money advanced(*u*).

Supposing a purchaser to be entitled to the custody of the deeds themselves, yet if any of them be lost, and the

(*r*) *Berry v. Young*, 2 Esp. Ca. 640, n.

(*s*) *Per Lord Eldon, Ex parte Stuart*, 2 Rose, 215.

(*t*) *Yea v. Field*, 2 T. Rep. 708.

(*u*) *Harrington v. Price*, 3 Barn. & Adolp. 170.

(*532)

vendor can deliver over copies which would be admitted as evidence at law, the purchaser will be compelled to take the title(*w*). But where a deed essential to the title is in the hands of a third person who is entitled to retain it, and would be compelled to produce it to the purchaser, the Court will not compel the purchaser to take the title unless the deed is deposited for the benefit of all parties(*x*). The purchaser is not bound to rely upon the equitable right to compel the production, but is entitled to the deeds, or a valid covenant to produce them(*y*).

It frequently happens, that a person having a covenant for production of the title-deeds to his estate, sells only part of the estate, and retains his purchase-deed, and the covenant to produce the deeds ; and in such cases I should conceive the practice to be for the vendor to enter into the usual covenant for production of the title-deeds in his possession, which of course would include the original covenant to produce the deeds. But it seems that Mr. Fearne thought(*z*) that a purchaser was, in cases of this nature, entitled to require the vendor to covenant for the production of the deeds to such an extent as the covenant in the vendor's possession entitled him to the production (*)thereof, unless he could procure a new covenant for that purpose from his grantors to the new purchaser ; but that such covenant from the vendor should not be enforced, in case he produce the original covenant to produce the deeds, when it should be required to defend the purchaser's title.

(*w*) *Harvey v. Phillips*, 2 Atk. 541. See an opinion of Mr. Booth's 2 Ca. and Opin. 223. As to the cases in which the execution of an instrument will be presumed, see *Skipwith v. Shirley*, 11 Ves. jun. 64 ; *Ward v. Garmons*, 17 Ves. jun. 134 ; and see *Holmes v. Ailsbie*, 1 Madd. 551.

(*x*) *Shore v. Collett*, Coop. 234.

(*y*) *Barclay v. Raine*, 1 Sim. & Stu. 449.

(*z*) Posth. 113.

It is not unusual to insert a proviso in a deed of covenant, to produce title-deeds for determining the covenant, in case the vendor sell the part of the estate retained by him, and procure the person to whom the estate is sold, and the title-deeds are delivered, to enter into a similar covenant with the first purchaser, for production of the title-deeds.



SECTION IV.

Of Covenants for Title.



LET us now proceed to consider what covenants for title a purchaser is entitled to.

The covenants usually entered into by a vendor seised in fee, are, 1st, that he is seised in fee ; 2dly, that he has power to convey ; 3dly, for quiet enjoyment by the purchaser, his heirs and assigns ; 4thly, that the estate is free from incumbrances ; and lastly, for further assurance(a).

Where a vendor has only a power of appointment, the first covenant ought to be, that the power was well created, and is subsisting ; and the other covenants should be similar to those entered into by a grantor seised in fee. In small purchases the first covenant is sometimes omitted, which may be safely done, for the first and second are synonymous covenants.

(*)It sometimes happens, that a purchaser consents to take a defective title, relying for his security on the vendor's covenants. Mr. Butler remarks, that where this is

(a) See *post.* ch. 13.

(*534)

the case, the agreement of the parties should be particularly mentioned, as it has been argued, that as the defect in question is known, it must be understood to have been the agreement of the purchaser to take the title subject to it, and that the covenants for the title should not extend to warrant it against this particular defect(b)(250).

(b) See *Butler's n.* (1) to Co. Litt. 384 a. See also *Savage v. Whitbread*, 3 Cha. Rep. 14.

(250) Every right to, or interest in the land granted, to the diminution of the value of the land, but consistent with the passing of the fee of it by the conveyance, must be deemed in law an incumbrance. We say consistent with the passing of the fee of the land by the conveyance, because if nothing passed by the deed, the grantee cannot hold the estate under the grantor. Thus a right to an easement of any kind in the land is an incumbrance. So is a mortgage. So also is a claim of dower, which may partially defeat the plaintiff's title, by taking a freehold in one third out of it. And for the same reason a paramount right which may wholly defeat the plaintiff's title is an incumbrance. It is a weight on his land, which must lessen the value of it. Conformably to these principles thus laid down by the Chief Justice, it was held in *Prescott v. Trueman*, 4 Mass. 627, where the defendant covenanted that the lands sold in fee were free from all incumbrances; and the plaintiff sued for *covenant broken*, that a paramount right was an incumbrance. *There*, the defendant being seized of the lands in question, which seisin he acquired by a conveyance from J. S., who was in by disseisin. The breach alleged was that the heirs of the disseisee had, at the time when the deed was executed, a paramount right to said lands. If the plaintiff, the grantee, observed the Chief Justice, has not extinguished the paramount right, but it still remains against his title, he shall recover nominal damages only. Neither shall the grantor, the defendant, after having once paid the value of the land, be afterwards called on by the plaintiff on a subsequent eviction. If the plaintiff has at a just and reasonable price, extinguished that title, so that it can never afterwards prejudice the grantor, the jury, who may enquire of the damages, will consider this price as the measure of damages.

Here, the covenant of seisin is not broken, for it is admitted that the grantor was seized: neither is the covenant of a right to convey, broken, for a man seized has a right to convey: and on the warranty there is no remedy, until after eviction.

The covenant that the grantor has good right to convey an indefeasi-

And it may be further observed, that in cases of this nature, unless the objection to the title appear on the face of the conveyance, the agreement to indemnify against the defect, and the covenants to guard against it, should be entered into by a separate instrument.

With respect to the *persons* against whose acts a vendor is bound to covenant, it seems that,

1st. A vendor who actually purchased the estate himself, for money, or other valuable consideration, and obtained proper covenants for the title, is not bound to enter into covenants extending beyond his own acts(c). This, Mr. Fearne remarks(d), is a practice founded in reason, where the vendee obtains the full benefit of all the covenants in the conveyance to the vendor, to the same extent as his vendor has them, by obtaining the possession of the deeds containing those covenants. When the vendor has parted with his means of claim or remedy against his grantor for breach of his covenants, and transferred them to the purchaser, by delivery of the deeds, and such vendee comes into the vendor's place, in that respect, by the acquisition of such deeds, it would be unreasonable that the vendor should make himself liable (*)for any such breach. He, by departing with the means

(c) See 2 Bos. & Pull. 22 ; and see two opins. in 3 Pow. Convey. 206, 210.

(d) Posth. 110.

ble estate in fee, but nominal damages could be given, until the estate conveyed had been defeated, or the right to defeat it had been extinguished. But this covenant is not usually in our deeds of conveyance.

The same principle was recognized in *Funk v. Voneida*, 11 S. & R. 109, where the court held the mortgage was a subsisting incumbrance although the money was not due ; and the plaintiff was entitled to nominal damages. And that the grantee if he chose might pay off the mortgage, and then he might recover the price it cost him. The existence of the incumbrance is the breach of covenant.

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of remedy or compensation, must be understood to have discharged himself from, and the vendee, by accepting those means, to have taken upon himself the peril or risk of, such breach, and the duty of enforcing its remedy or compensation.

2dly. Mr. Fearne, however, thought, that where a vendor retains the title-deeds, he is bound to enter into covenants extending to the acts of the persons against whose acts he is indemnified by the deeds in his possession(*e*): but he also thought these covenants should be qualified by the insertion of a covenant on the part of the purchaser, that in case any claim should be made under the vendor's covenants against the acts of the former owner, and he (the vendor) should produce the deeds, in order to enable the purchaser to avail himself of the covenants contained in them, then no advantage should be taken of the vendor's covenants.

This, however, is a distinction never attended to in practice: if a vendor is entitled to retain the deeds, he enters into the usual covenant for the production of them, but never enters into more extensive covenants for the title, on account of the retention of the deeds.

3dly. Where a vendor does not claim by purchase in the vulgar and confined acceptation of that word(*f*); that is, by way of bargain and sale for money, or some other valuable consideration, a purchaser is entitled to require covenants from such vendor, extending to the acts of the last purchaser. For instance, if I sell an estate which was devised to me, and the deviser's father purchased the estate, the covenants for title are extended to the acts of the father(*g*)(251). And a person claiming under a

(*e*) See the Lord Buckhurst's case, 1 Rep. 1.

(*f*) See 2 Black. Comm. 241.

(*g*) See acc. two opins. in 3 Pow. Conv. 206, 210.

(251) See 4 Munf. 144.

voluntary (*)conveyance is considered in the same light as a devisee. So a person whose estate is sold under an order of a court of equity, or by a trustee to whom he has conveyed it upon trust to sell, is bound to covenant for the title in the same manner as he must have done if he himself had sold the estate.

But although the *universal and settled practice* of conveyancers is, to extend covenants for the title to the acts of the last purchaser, yet the Court of Chancery appears to hold, that a person not claiming by purchase is only bound to covenant against his own acts, and those of the person immediately preceding him(*h*). The rule established by practice is undoubtedly the most reasonable, for every purchaser is certainly entitled to a regular chain of covenants for the title. No solid reason can be given why any line should be drawn, and the covenants should extend to the person only who immediately preceded the vendor; and, however the Court of Chancery may act upon this rule, the practice of the Profession has taken too deep a root to be easily extirpated.

4thly. Where an estate is sold by trustees under a will, and the money is to be applied in payment of debts, &c. and the residue is given over, a purchaser is not entitled to any covenants for the title, because no line can well be drawn as to the *quantum* which would make a person liable to covenant; and therefore, if this rule were not settled, a person who only took 5*l.* might as well be required to covenant, as one who took a large sum(*i*)(252).

The same rule applies *ex necessitate* where an estate is sold for similar purposes under an order of a court of

(*h*) See 3 Atk. 267; 3 Ves. jun. 236; and see 14 Ves. 239.

(*i*) *Wakeman v. Duchess of Rutland*, 3 Ves. jun. 233, 504, affirmed in *Dom. Proc.* 8 Bro. P. C. 145; and see *Lloyd v. Griffith*, Atk. 264.

(252) See *Grantland v. Wight*, 5 Munf. 295.
(*536)

equity. If a different rule prevailed, the consequence (*) would be, that the estate could never be sold by decree, till the account was taken of all the debts; because, before that account was taken, it could not appear who were to join in the conveyance, what was the number, and in what proportions they were beneficially entitled; but it is the constant practice to sell the estate in the first instance; of course the title can be made only by the trustees for sale, without calling in the parties who are presumptively beneficially interested (k).

In both these cases, therefore, the purchaser is only *entitled* to a covenant from the parties conveying, that they have done no act to incumber. But it is to be lamented, that in these instances also the rule of the Court of Chancery differs from the practice of the Profession; for it always has been, and still is, the practice of the Profession to make all the *cestuis que trust*, whose shares of the purchase-money are in anywise considerable, join in covenants for the title, according to their respective interests.

The rule of equity on this subject may of course be altered by the agreement of the parties (l); and therefore, in all agreements for purchase of estates from devisees, &c. in trust to sell, the purchaser should stipulate, that such of the persons entitled to the purchase-money as he may require, shall join in the usual covenants for the title. Where, however, the trust is to pay debts, or trifling legacies, which will exhaust the whole of the purchase-money, it is obvious that such a stipulation could not be carried into effect, and it had therefore better be omitted.

It must, however, be remarked, that the case of *Wakeman v. Duchess of Rutland* is by no means an authority that *cestuis que trust* of money to be produced by the sale

(k) See 3 Ves. Jun. 505, 506.

(l) See 3 Ves. Jun. 236.

of estates devised to trustees to sell, cannot in any instance (*)be required to covenant for the title. Where the money to arise by sale of the estate is absolutely given to two or more persons, they are substantially owners of the estate, and must accordingly covenant for the title.

So, even where the money is in the first place to be applied in payment of debts, yet if they are all paid previously to the sale, the *cestuis que trust* must, it is conceived, covenant for the title.

Upon this case another observation occurs. Lord Rosslyn seemed to think it dangerous to make the *cestuis que trust* parties to the conveyance; he said, the prudence of the common clause, that the receipts of the trustees shall be a discharge to the purchaser, would be defeated, and the purchaser would take upon himself the knowledge of all the trusts of the will(m). If this be so, conveyancers are indeed reprehensible; but as the purchaser buys under the will, whether the *cestuis que trust* are or are not parties to the conveyance, he is equally affected with the knowledge of the trusts; and yet, as *cujus est dare ejus est disponere*, it cannot be supposed that equity would compel a purchaser to see to the application of the purchase-money, when the testator himself has declared he shall not. In *Ewer v. Corbet*(n), it was holden, that notice to a purchaser of a bequest of a term did not signify, as *every person buying of an executor where he is named executor, necessarily must have such notice*. This resolution applies to the point in question, and seems to place it beyond controversy.

Lastly, in conveyances by the Crown, a purchaser is not entitled to any covenants for the title; and where an estate is sold by assignees of a bankrupt, the purchaser is only entitled to a covenant from the assignees, that they have not done any act to incumber the estate.

(m) See 3 Ves. Jun. 235.
(*538)

(n) 2 P. Wms. 148.

(*)But a bankrupt is always made a party to the conveyance of his estate, to prevent the difficulty which the purchaser might otherwise be put to in maintaining and proving the title ; and the bankrupt is generally made to enter into covenants for the title in the same manner as he would have done, had he sold the estate while solvent.



SECTION V.

Of searching for Incumbrances.

It now comes in order to consider in what cases incumbrances should be searched for.

I. There are few cases in which judgments should not be searched for on the part of a purchaser ; and if there is any reason to suspect the vendor, it is absolutely necessary to search immediately before the conveyance is executed, lest any judgments may have been entered up during the treaty ; although if any judgments should be entered up after the purchase-money, being an adequate consideration, is actually paid, equity would relieve the purchaser against the judgments, notwithstanding that they were entered up previously to the execution of the conveyance ; the vendor being, in equity, only a trustee for the purchaser, and a judgment being merely a general lien, and not a specific lien on the land : and this equity prevails, whether the judgment creditor had or had not notice of the contract(o)(I).

(o) See Nels. Ch. Rep. 184 ; Finch v. Earl of Winchelsea, 1 P. Wms. 278 ; 10 Mod. 418 ; 11 Vin. Ab. 118 ; and see Kennedy v. Daly, 1 Scho. & Lef. 373 ; Prior v. Penpraze, 4 Price, 99.

(I) See 9 Geo. 4, c. 35, as to judgments binding purchasers in Ireland.

(*) In a case where a reversioner in fee first executed a bond, with a warrant of attorney to enter up judgment, and then mortgaged to another in fee, and on the 1st of January 1810 contracted to sell the estate to a purchaser without notice, and on the 5th of February 1810 a judgment was entered up and docketed, on the 28th of November 1812 an elegit issued, and an inquisition taken thereon on the 20th of January 1813, of which notice was given to the purchaser on the 16th of April 1810, but on the 15th of March 1810 the mortgagee in fee and the mortgagor had conveyed the estate in fee to the purchaser without notice, and a part of the purchase-money was secured to the seller by a legal term of years, and which was unpaid when notice of the judgment was given, *and afterwards the purchaser paid off the mortgage, and took a surrender of the term*(I), upon a bill filed by the judgment creditor, the Vice-Chancellor held, that as the greater part of the purchase-money was paid, and the rest secured by the term when the notice was given, the judgment creditor had no remedy in equity against the fee. The purchaser was then the mortgagor for the term. The notice therefore was nothing more than notice to the mortgagor that a person to whom he had granted a legal term, by way of mortgage, was indebted on judgment; but a judgment is, at law, no lien upon a legal term; and when the interest of the debtor is legal, a judgment is no lien in equity. Notwithstanding this judgment, the debtor could well assign his legal term at his pleasure. If there was no lien upon the term in the hands of the debtor, there could be no lien upon the term in the hands of his assignee(*p*).

(*p*) Forth *v.* The Duke of Norfolk, 4 Madd. 503. The case was heard upon appeal before Lord Eldon, who called for further papers. The parties agreed to be bound by his opinion.

(I) This fact appears from the papers in the cause.
(*540)

(*) It seems advisable to ask the vendor, or his attorney, whether there are any incumbrances which do not appear on the abstract; for if he answer in the negative, the search for judgments may be postponed until immediately before the execution of the conveyance; and if there are any judgments, and the purchase cannot be completed on that account, the purchaser can recover all his expenses from the vendor(*q*). It should seem, however, that the purchaser would equally be entitled to recover the expense of the conveyance, although he had not inquired after, or searched for, incumbrances before it was prepared, provided that he had examined the abstract with the deeds, and that the abstract did not disclose the incumbrances.

A purchaser who, at the time of his contract, is seised of the legal estate, as a mortgagee, need not search for judgments subsequently to the mortgage, for an equity of redemption is not within the clause of the statute of frauds, which will shortly come under our consideration; and it is, therefore, not extendable(*r*)(I)(253). And as the pur-

(*q*) *Richards v. Barton*, 1 Esp. Ca. 268; *vide supra*, ch. 4.

(*r*) *Lyster v. Dolland*, 1 Ves. jun. 431; 3 Bro. C. C. 478; and see *Burdon v. Kennedy*, 3 Atk. 739; *Scott v. Scholey*, 8 East, 467; *Metcalf v. Scholey*, 2 New Rep. 461.

(I) *Note*. An equity of redemption has been held to be assets under the statute of frauds, 2 Freem. 115, pl. 130; although the determination appears not to have been acted upon. It were much easier to maintain that an equity of redemption is extendible under the statute. — *Note*, the case of *Freeman v. Taylor*, 3 Keb. 307, was before the statute.

(253) See *Punderson v. Brown*, 1 Day, 93. *Willington v. Gale*, 7 Mass. Rep. 138. But in *Massachusetts*, an equity of redemption is made extendable by statute. In *Pennsylvania*, a judgment is a lien upon every kind of equitable interest in land, vested in the debtor at the time of the judgment. *Curkhuff v. Anderson*, 3 Binn. 4. But see *Hurt v. Reeves*, 5 Hayw. 53.

chaser will, by the contract, acquire equal equity with the judgment creditor, and has already got the legal estate, his title cannot be impeached. Some gentlemen of eminence even hold, that notice of judgments entered up *subsequently to the mortgage* will not affect the purchaser; but (*)it is conceived, that if he purchase with notice, either express or implied, of any judgment, the legal estate will not protect him in equity against the judgment creditor. The judgment is a lien upon the estate in equity(s), and confers a right on the creditor to redeem a prior mortgage or other incumbrance(t)(254). And by the first principles of equity, a purchaser, with notice of any incumbrance, is bound by it in the same manner as the person was of whom he purchased(u)(255). And, indeed, it has been expressly decided, that a mortgagee, purchasing the equity of redemption, is bound by judgments of which he has notice, although they were entered up subsequently to the mortgage(x).

This doctrine prevailed before the statute of frauds, and has been the observed rule of equity ever since; and

(s) *Churchill v. Grove*, Nels. Cha. Rep. 89; 1 Cha. Ca. 35.

(t) See 2 Cha. Rep. 180.

(u) See Anon. 2 Ventr. 361, No. 2.

(x) *Greswold v. Marsham*, 2 Cha. Ca. 170; *Crisp v. Heath*, 7 Vin. Abr. 52, (E). pl. 2. *Tunstall v. Trappes*, 2 Sim. 286.

(254) "A legal priority will be preserved in Chancery." *Codwise v. Gelston*, 10 Johns. Rep. 522. *Per KENT*. In *Virginia*, the lien of a judgment upon the lands of the party, relates back to the commencement of the term at which it was rendered. *Mutual Ins. Soc. v. Stannard*, 4 Munf. 539—542. See *Winston v. Johnson's Exrs.* 2 Munf. 305. But in *North Carolina*, a judgment is a lien upon lands only from the time it is pronounced. *Den v. Hill*, 1 Hayw. 72, 95. Or from the teste of the *fi. fa.* 1 Hayw. 99, 100.

(255) A verbal communication by a stranger to a purchaser, before he receives a conveyance, that a claim to the land exists, is sufficient notice to charge him with the equity of such claim. *Currens v. Hart*, Hardin, 37. And see *Wadsworth v. Wendell*, 5 Johns. Ch. Rep. 224.

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it is said, that previously to the statute of frauds, a judgment creditor was in like manner, and upon the same principles, relievable in equity against *a conveyance to trustees*. And by the tenth section of that statute it is enacted, that execution may be delivered upon any judgment, statute, or recognizance, of all such lands, &c. as any other person or persons shall be seised or possessed of in trust for him against whom execution is so sued, in the same manner as if he had been seised of such lands, &c. of such estate as they be seised of in trust for him *at the time of the execution sued*, and shall be held discharged of the incumbrances of the trustee. Upon the construction of this statute it hath been holden, that if a trustee has conveyed the lands before execution sued, though he was seised in trust for the defendant at the time of the (*)judgment, the lands cannot be taken in execution(y). Now it is clear, that where the fee is in trustees, the purchaser would not be bound by any judgment, upon which no writ of execution had been sued, and of which he had not notice. But here, as in the preceding case, the purchaser, it is contended in practice, cannot be advised to rely on the legal estate in the trustees, where he has notice of any subsequent judgments. Mr. Powell(z), however, entertained a contrary opinion. After showing that trust-estates can only be taken in execution by virtue of the statute of frauds, he contends, that where the legal estate is in a trustee, *notice* to a purchaser of judgments is immaterial, because the lands are not liable at law; and, as *equity follows the law*, no relief would be granted against the purchaser, through the medium of a court of equity.

If the case of *Hunt v. Coles* be an authority, it must

(y) *Hunt v. Coles*, Com. 226. See *Higgins v. The York Buildings Company*, 2 Atk. 137; *Harris v. Pugh*, 4 Bingh. 335; 12 Moo. 577, S. C.

(z) 2 Mort. 4th edit. p. 608.

be acknowledged that trust-estates cannot be affected by any execution sued upon a judgment after the trustee has conveyed away the lands. But admitting, that before the statute of frauds, an incumbrancer might be relieved against a conveyance to trustees, it should seem to follow, that the same equity must still be administered. It were difficult to contend, that the statute has concluded the equitable relief. The registering acts expressly enact, that a purchaser shall not be bound by instruments, &c. unless they are registered, notwithstanding which equity will fasten on the conscience of a purchaser who bought with notice of any unregistered incumbrance; and there is surely greater reason to hold, that the jurisdiction of equity shall not be barred by a statute which merely (*) gives a partial remedy at law without interfering with the equitable rights of the parties.

The difficulty in the way of the relief would be, that no case can be found, after the most diligent search, in which a judgment creditor has been relieved against a conveyance to trustees, where a purchaser had subsequently acquired the legal estate. The author formerly thought that equity would relieve against the purchaser, if he bought with notice; but his confidence in that opinion has been shaken by the want of authority in support of it. Nothing but a judicial determination can set the doubt on this point at rest(a).

The statute only extends to clear and simple trusts for the benefit of the debtor. Therefore a trustee of a term of years for securing an annuity, and subject thereto for the grantor, is not a trustee within the statute(b).

Where, however, an estate is conveyed to trustees upon trust to sell, and pay debts, &c. and to pay the surplus of the monies to arise by sale to the grantor, and the receipts

(a) See *Steele v. Phillips*, 1 Beatty, 193.

(b) *Doe v. Greenhill*, 4 Barn. & Ald. 684.

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of the trustees are made sufficient discharges to the purchasers; the better opinion is, that the purchaser is not bound by any subsequent judgments of which he has even express notice. Great difference of opinion has prevailed in the Profession on this point. Those who hold that a purchaser is bound by such judgments, rightly compare the interest of the grantor in the estate to an equity of redemption. But as such an interest is not extendible, the debt of the judgment creditor can only, it should seem, affect the surplus monies in the hands of the trustees, and is not a lien on the estate itself. When the receipts of the trustees are once made a discharge to the purchaser, there surely is not any equity in a subsequent (*)incumbrancer to require the purchaser to see to the application of any part of the money. The creditor stands, as to his debt, in the place of his debtor, and consequently is entitled to have his debt discharged out of the surplus monies in the hands of the trustees; but he cannot, it is conceived, claim a higher equity; the contrary rule would be productive of infinite inconvenience.

In *Lodge v. Lyseley*(c), a father tenant for life and his son tenant in tail in remainder joined in conveying the estate to trustees to sell, and to pay 30,000*l.*, part of the purchase-money, to the father, and the residue to the son. The trustees, whose receipts were made good discharges, contracted to sell the estate, and judgments were afterwards entered up against the father. The Vice Chancellor held that the purchaser could not be affected by the judgments. His Honor observed, that by the conveyance to which the father and son were parties, the son acquired a clear right in equity to have the trusts expressed in the conveyance performed, because he amalgamated his remainder in tail (which was converted into a fee by the recovery) with the father's life estate; and it was agreed

(c) 4 Sim. 70.

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between them that there should be an immediate sale of the whole, and a division made of the purchase-money. Part was to be applied in payment of the father's debts, and 30,000*l.* was then to be paid to the father, and the clear residue was then to be paid to the sons; therefore as soon as the conveyance was executed the son had a clear right to file a bill against the father and the trustees for a sale, according to the trusts expressed; and inasmuch as part of the trust is, that the trustees should sell and give releases to the purchaser, there could be no execution of the trusts without allowing the trustees to receive the money and give their receipts, which were to (*) discharge the purchasers. This case, he observed, bore no resemblance to the cases mentioned. The case that it most resembled was that which was submitted for Mr. Serjeant Hill's opinion(*d*). But even in that case he should not have given the opinion which the learned Searjeant did, because it appeared to him that from the time the party entered into binding contracts to sell his estates to purchasers, he not having judgments against him at that time, the purchasers had a right to file a bill against him, and have the legal estate conveyed, and if he had subsequently confessed a judgment, that judgment never could have impeded the progress of the legal estate to them. As to the case of *Forth v. The Duke of Norfolk*, no decision was given there on the point which might have arisen, because the chattel interest had ceased to have existence. His notion was, that it was of the essence of the trusts, which the son, as the purchaser, had a right to have performed, that the trustees should convey the legal estate, and give receipts for the purchase-money. His opinion was so clear, that he did not think that he ought to allow the purchaser to say that there was a doubt on the point.

(*d*) See the opinion in 4 Madd. 506, n.

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As a mortgagee seised or possessed of a legal estate need not search for judgments, so a purchaser, who obtains an assignment of a legal subsisting term of years in trust to attend the inheritance, may dispense with a search for judgments, &c. if he be assured that notice of any incumbrance cannot be proved on him or any of his agents. But as notice may be inferred from very slight circumstances, a purchaser cannot be advised in any case, or under any circumstances, to dispense with the usual searches. And even where he does rely on a term of years, yet if it be recently created, incumbrances (*) should be searched for previously to the creation of the term.

It is, I believe, usual to search for judgments against a vendor, only from the time he purchased the estate; but this practice is not correct, because judgments bind after-purchased lands, and will consequently affect such lands even in the hands of a purchaser(e)(256).

(e) See Sir John de Moleyn's case, 30 E. 324 a; 1 Ro. Abr. 892, pl. 14, 16; 42 E. 3, 11 a; 42 Ass. pl. 17; 2 H. 4, 8 b. pl. 42; 14 a, pl. 5; 2 Ro. Abr. 472, (P.) pl. 3; Shep. Prac. Couns. 305; Hickford v. Machin, Winch, 84, per Jones, J.; and Brace v. Duchess of Marlborough, in 2d Resol. 2 P. Wms. 492.

(256) In *Colhoun v. Snyder*, 6 Binn. 138, YEATES, J. says, "The note subjoined to *Sugden*, has enumerated some other cases, none of which, upon inspection, will be found to warrant the doctrine in the extent laid down." He also said, that Sir John De Moleyn's case "not only does not support the inference of the abridgers, but is directly opposed thereto." p. 139. The decision in *Colhoun v. Snyder*, was upon the very point; and it was held, that judgments were not a lien upon after-purchased lands, if aliened before execution. See *Rundle v. Etwein*, 6 Binn. 136. in note. But in *New-York*, a different rule has been adopted. "It cannot be doubted, that a judgment will attach on lands, of which the judgment debtor becomes seised at any time posterior to the judgment." *Stow v. Tift*, 15 Johns. Rep. 464. Per SPENCER, J. And an elder judgment is a lien upon lands, in the hands of the purchaser, sold under a *fi. fa.* issued upon a junior judgment. *Ridge-*
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Judgments do not bind leasehold estates till writs of execution are taken out upon them, and delivered to the sheriff(*f*). And yet, upon purchase of a leasehold estate, judgments must be searched for; because the sheriff will not permit his office to be searched for any writ of execution which may have been delivered there, lest the purposes of the writ should be defeated by the party against whom it is issued absconding, or removing his goods. Therefore, although the judgment will not of itself bind the leasehold estate, yet the purchaser cannot safely complete his contract, where he discovers a judgment, because he cannot be satisfied that an execution issued upon it has not been lodged with the sheriff. When we consider how many valuable leasehold estates are daily brought into the market, we shall perhaps think that the Legislature would do well to enact, that writs of execution *intended to bind leasehold estates* shall be docketed in like manner as judgments, and that where the estate lies in a register county, they shall be registered.

But old judgments existing against a former owner of (*)a leasehold estate upon which it does not appear that execution issued, will not be considered an objection to a seller's title(*g*).

Where only an equity of redemption of a term is purchased, the purchaser will not be affected by even an execution lodged, of which he had not notice, for such an interest is not extendible under the statute of frauds, and certainly the mere delivery of the writ to the sheriff would not be implied notice to a purchaser(*h*).

(*f*) *Vide post*. Ch. 16.

(*g*) *Causton v. Macklew*, 2 Sim. 242; *Williams v. Craddock*, 4 Sim. 313.

(*h*) See 1 Ves. jun. 431; 3 Atk. 739.

ley's Exr. v. Gartrell, 3 Har. & M'Hen. 450. See *Sanford v. Roosa*, 12 Johns. Rep. 162.

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These observations, respecting judgments, must not be closed without observing, that if a person purchase part of an estate subject to a judgment, and the residue of the estate remain in the hands of the conusor, or descend to his heir, and execution is sued only against the original debtor or his heir, he shall not have contribution against the purchaser, and the consideration of the purchase is not material in these cases. But if execution be sued against the purchaser only, he shall have contribution against the person seised of the residue of the estate, whether they acquired it by descent or purchase(*i*).

Sir Edward Coke observes(*j*), that when it is said that if one purchaser be only extended for the whole debt, that he shall have contribution; it is not thereby intended that the others shall give or allow to him any thing by way of contribution; but it ought to be intended, that the party who is only extended for the whole, may, by *audita querela*, or *scire facias*, as the case requires, defeat the execution, and compel the conusor to (*)sue execution of the whole land; so, in this manner, every one shall be contributory, *hoc est*, the land of every terre-tenant shall be equally extended.

II. To resume the consideration of the cases in which incumbrances should be searched for:

If the estate lie in a register county(I), the registrar's office should be searched, for the purpose of ascertaining not only that the estate is free from incumbrances, but also, that the title-deeds are duly registered;—the estate may be lost by neglecting to do so. And if it appear

(*i*) Sir William Herbert's case, 3 Co. 11 b. See the distinctions taken in *Blakeston v. Martyn*, 1 Jo. 90; and see *Hartly v. O'Flaherty*, 1 Beatty, 61.

(*j*) 3 Co. 14 b.

(I) For some observations on the registry acts, see *infra*, ch. 16.

that any deed has not been duly registered, the vendor must procure it to be registered at his own expense, previously to the completion of the contract; although, indeed, it sometimes happens that an instrument not being registered, prevents an objection being made to the title. To give an instance of this, let us suppose a man to have mortgaged his estate, and paid off the money, but to have neglected to take a re-conveyance. Now, in this case, if the mortgage was not registered, the purchaser need not insist upon its being registered, and require a re-conveyance from the mortgagee; because, as the deed was not registered, the mortgagee did not acquire the legal estate, or if he did, would cease to have it by the registry of the conveyance to the purchaser; and, being paid off, he has of course no equity. So where a partial interest in an estate is devised to the heir at law, with a power of leasing, and he grant a lease not authorized by his power, the lease may, in some cases, be sustained both at law and in equity, in case the will was not registered according to the act. This, however, is a mode of making a title to which necessity only should compel us to resort.

(*) It is very seldom that wills are registered; but a purchaser from a devisee should not complete his contract till the will is duly registered; for should any person purchase of the heir at law *bona fide*, and without notice of the will, and register his conveyance before the registry of the will, he would be preferred to the purchaser from the devisee(k).

But if the vendor be both heir at law and devisee, the non-registry of the will is immaterial; for if he sell to any subsequent purchaser, it must be either in the character of heir at law, or in the character of devisee. If he sell in this character, the second purchaser must have notice

(k) See *Jolland v. Stainbridge*, 3 Ves. jun. 478.

of the will ; if he contract in that, the first purchaser has already procured the legal estate.

So it seems clear, that if the vendor claim a leasehold estate, either as executor or legatee, the purchaser need not insist upon the testator's will being registered, because no subsequent purchaser can procure a title without notice of the will ; and it may be remarked, that letters of administration are never registered, and they seem to stand upon the same principle as wills of leasehold estates.

If a purchaser be already seised of the legal estate, as if he be mortgagee in fee, and has contracted for the equity of redemption, it is not actually necessary to search the register if he be assured that notice cannot be proved either on himself, or on any one concerned for him ; because the mere registration of deeds, as we shall hereafter see, is not notice to a purchaser seised of the legal estate previously to the purchase, and he will, therefore, be entitled to hold against any *puisne* incumbrance of which he had not notice.

Where the estate lies in the county of Middlesex, judgments need only be searched for at the registrar's office, (*)as judgments bind estates in that county only from the time they are memorialized ; but this is not the case in the county of York ; for in the North Riding, any judgment registered within twenty days after the acknowledgment or signing of it, is available in the same manner as if it had been registered on the day it was acknowledged or signed(*l*) ; and in the East and West Ridings, and in Kingston-upon-Hull, thirty days are allowed for the registering of judgments(*m*). Therefore, where the estate lies in York, or Kingston-upon-Hull, recent judgments must be searched for in the proper courts.

It has already been observed, that judgments do not

(*l*) 8 Geo. II. c. 6, s. 33.

(*m*) 5 Anne, c. 18, s. 11 ; 6 Anne, c. 35, s. 28.

bind leasehold estates till delivery of a writ of execution to the sheriff. Writs of execution upon judgments intended to affect leasehold estates in a register county, were formerly never registered(*n*). From the present practice of registering writs of execution, it may perhaps be concluded that they ought to be registered ; but the registry of them seems *causus omissus* out of the statutes for registry ; and therefore, upon the purchase of a leasehold estate in a register county, not only the register, but also the proper courts, should be searched.

The register ought to be searched immediately before the execution of the conveyance, for the same reason that the search for judgments should be delayed till the last moment.

And lastly, since grants of annuities have become so prevalent, and can be searched for, it is the duty of the purchaser's solicitor to search for annuities. In a register county they need only be searched for at the registrar's office.

(*)It may be useful to observe, that if a purchaser is damnified by his solicitor neglecting to search for incumbrances, it is clear that he may recover at law against the solicitor, for any loss occasioned by his negligence(*o*)(257). But an attorney's negligence cannot, perhaps, in any case, be set up as a defence to an action by him for the business done, although it should seem that if there is a cross-action by the client against the attorney, the Court will,

(*n*) *Vide infra*, ch. 16.

(*o*) *Brooks v. Day*, 2 Dick. 572 ; *Forshall v. Coles*, 7 Vin. Abr. 54, pl. 6, MS. ; and Appendix, No. 20 ; *Green v. Jackson*, Peake's Ca. 236 ; *Ireson v. Pearman*, 5 Dowl. & Ryl. 687. See *Baikie v. Chandless*, 3 Camp. Ca. 17.

(257) See *Huntington v. Rumdell*, 3 Day, 390. *Smede's Exrs. v. Elmendorf*, 3 Johns. Rep. 185. *Dearborn v. Dearborn*, 15 Mass. Rep. 316.

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upon application, stay the execution in the action by the attorney pending the other(*p*).

So if the chief clerk, whose duty it is to enter up and docket judgments, neglect to do so, by which a purchaser who has made the proper searches, sustains any loss, he, the purchaser, has a remedy against the clerk by an action on the case(*q*)(258). And any person who is damnified by the neglect of the registrar of either of the registering counties, may bring an action against him, in which he will recover treble damages and costs of suit, by virtue of the registering acts(I).



(*)SECTION VI.

Of Relief from Incumbrances.



HAVING considered in what instances incumbrances should be searched for, let us now inquire, 1st, In what cases a purchaser may detain the purchase-money, if incumbrances are discovered previously to the payment of it: and 2dly, To what relief he is entitled, if evicted after the money is actually paid; and these inquiries will involve the consideration of the cases in which a pur-

(*p*) *Templer v. M'Lachlan*, 2 New Rep. 136.

(*q*) *Douglas v. Yallop*, 2 Burr. 722.

(I) By the registering acts for Scotland, the remedy is extended against the heirs of the clerk, although no action shall have been commenced in the clerk's life-time. 1 Ersk. Inst. B. II. T. III. s. 42.

(258) See *Russel v. Clayton*, 3 Call, 41—43. *Commonwealth v. Walbert*, 6 Binn. 292. *Work v. Hoofnagle*, 1 Yeates, 506.

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chaser will be relieved in respect of defects in the title to the estate.

I. First then, 1. Where an incumbrance is discovered previously to the execution of the conveyance, and payment of the purchase-money, the vendor must discharge it, whether he has or has not agreed to covenant against incumbrances, before he can compel payment of the purchase-money^(r)(259).

2. But if a purchaser, before executing the articles, has notice of an incumbrance *which is contingent*, and it is by the articles agreed that the vendor shall covenant against incumbrances, the purchaser has entered into them with his eyes open, has chosen his own remedy, and equity will not assist him^(s); and he cannot, therefore, detain any part of the purchase-money.

(*)II. 1. Although the purchaser has paid the money, yet if he is evicted before any conveyance is prepared and executed, or before the conveyance is executed by *all* the necessary parties, he may recover the purchase-money in an action for money had and received, although the intended covenants do not extend to the title under which the estate was recovered, and he may have taken possession of the estate^(t)(1)(260).

^(r) Anon. 2 Freem. 106; Vane v. Lord Barnard, Gilb. Eq. Rep. 6; Serj. Maynard's case, 2 Freem. 1; 3 Swanst. 651; and see 1 Ves. 88; 2 Ves. 394; 2 Ves. jun. 441; and 4 Bro. C. C. 394.

^(s) Vane v. Lord Barnard, *ubi sup.*

^(t) Cripps v. Reade, 6 Term Rep. 606; Matthews v. Hollings, Woodfall's Law Land. 35, cited; Johnson v. Johnson, 3 Bos. & Pull. 162; and see Awbry v. Keen, 1 Vern. 472; and see Brig's case, Palm. 364; Simmons v. Hunt, 1 Marsh. 155; Jones v. Ryde, 5 Taunt. 488.

(I) In Robinson v. Anderton, Peake's Ca. 94, Lord Kenyon permitted a purchaser of *fixtures* in a house which were scheduled in the orig-

(259) See *Witherspoon v. Anderson's Exrs.* 3 Des. 246.

(260) See *Judson v. Wass*, 11 Johns. Rep. 525, 527. *Chute v. Ro* (*554)

2. But if the conveyance has been actually executed by *all* the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase-money either at law(*u*), or in equity(*x*)(261).

This was Serjeant Maynard's case(*y*). The plaintiff exhibited his bill to be repaid 600*l*. Sir Edward Moseley devised certain Leicestershire lands unto his wife, (afterwards Lady North,) for life, remainder to the first, second, third, fourth, fifth, and tenth son of his sister Maynard, (wife of Joseph Maynard, the Serjeant's eldest son,) in tail, remainder to Nicholas Moseley, the father of Oswald, for life, remainder to Oswald Moseley in tail,

(*u*) See *Cripps v. Reade* ; *Johnson v. Johnson* ; and *Bree v. Holbech*, Dougl. 654.

(*x*) Serjeant Maynard's case, 2 Freem. 1 ; 3 Swanst. 651 ; Anon. 2 Freem. 106.

(*y*) 3 Swanst. 651.

inal lease, and belonged to the landlord, to recover the purchase-money, although the person who sold them was an under-tenant, *and had himself ignorantly paid for the fixtures*.

bisons, 2 Johns. Rep. 595. *Gillet v. Maynard*, 5 Johns. Rep. 85. *Van Eps v. Corporation of Schenectady*, 12 Johns. Rep. 436. *Shearer v. Fowler*, 7 Mass. Rep. 31. *Ellis v. Hoskins*, 14 Johns. Rep. 363. *Caswell v. Black River Manufacturing Co.* 14 Johns. Rep. 453.

(261) See *Howes v. Barker*, 3 Johns. Rep. 506. *Abbott v. Allen*, 2 Johns. Ch. Rep. 523. *Frost v. Raymond*, 2 Caines' Rep. 188. *Abbott v. Allen*, 2 Johns. Ch. Rep. 523. *Per Kent*. *Gouverneur v. Elmen-dorf*, 5 Johns. Ch. Rep. 79.

Where the vendor sells land with warranty, to hold from the death of the grantor, no action will lie to recover back the money paid. Thus, in *Wallis v. Wallis*, 4 Mass. 135, Parsons, C. J. said, 'The most that can be urged for the plaintiff is, that nothing passed by the deed, as it was intended to convey an estate *in futuro* ; but he voluntarily paid his money, and took a covenant from the grantor, that after his death, the grantee and his heirs should have the land. But the plaintiff is mistaken in his construction of the deed ; for by the covenant to stand seised to uses the conveyance can be effected.

with other remainders over, and died in October 1665. The Serjeant goes down into Lancashire, peruses all the writings, (makes agreements with Mr. Edward Moseley, on behalf of his son, not to contest the will, and to discharge a lease for eleven years, and thereupon bath 10,000*l.* debt secured by judgment, all which agreements his son flies off from, and tries the will, &c.) and perceiving (*)that if the will stood, (as he believed it would do, having examined all the witnesses upon the place,) then it would be in the power of my Lady North, by joining with Nicholas and Oswald, to bar all the contingent remainders to his daughter's children, who at that time had none, and so the Leicestershire lands, worth 600*l.* per annum, would be lost : In December 1665 comes to an agreement with Nicholas and Oswald to buy their remainder or possibility in the Leicestershire lands for 600*l.*, and pays it down ; and the manner of the further assurance was to be thus : Nicholas and Oswald were to procure the Lady North (without whom it could not be done) to join with them in a common recovery before the end of three years ; and to secure this, Nicholas and Oswald gave a bond of 1,200*l.* to the Serjeant, conditioned, that if no recovery be suffered within three years, whereby the estates of Nicholas and Oswald may be sufficiently barred, then upon the re-conveyance of the premises to repay 600*l.* After this, Mrs. Ann Moseley sets up a title to the Leicestershire lands by virtue of a will of Sir Edward Moseley's father, found in loose sheets among the evidences, and supposed to be suppressed by the son, upon which title she exhibited a bill in this Court, and obtained a decree for the Leicestershire estate, notwithstanding which eviction the recovery was suffered within the three years by the Lady North and Nicholas and Oswald Moseley in due form ; and now the Serjeant demanded the 600*l.* in equity, because no

re-conveyance of the premises could be made within three years, in regard the title was evicted, and the recovery did him no good. But Lord Nottingham dismissed the bill.

Lord Nottingham, in delivering judgment, said that the cause which was heard before, and dismissed, came now to be re-heard at the plaintiff's importunity, who (*)pressed earnestly for a decree, but he continued of the same opinion in substance, and caused the reasons of that opinion to be specially entered by the registrar in manner following: "His Lordship declared, that as this Court suffers no man to over-reach another, so it helps no man who hath over-reached himself without any practice or contrivance of his adversary; that it was most plain in this case there was no fraud nor concealment in the defendants at the time of the sale of their remainders, but all things were more open, and better known to the plaintiff than they were to the defendants, for the plaintiff had been upon the place and perused the evidence of the family, and the defendants did not solicit the plaintiff to buy, but the plaintiff importuned the defendants to sell their remainders, and had reason so to do, for otherwise, as things then appeared on all hands, the defendants, with the concurrence of the Lady North, might have disinherited the issue male to be begotten on Mrs. Maynard of all the Leicestershire estate, worth 600*l.* per annum. Accordingly the plaintiff covenants with the defendants for their title for 600*l.*, which was much short of what it was then worth in all appearance, and the plaintiff draws his own assurance, and pens the defeasance of that bond, upon which he now sues in equity to have back the 600*l.* and interest, by which very bill the plaintiff admits that the defendants can no way be charged with the bond at law. It remains, ergo, to be considered what grounds there are to charge them in equity; for the

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defendants, who made no corrupt or fraudulent agreement at first, insist upon it that they have literally performed that agreement which they made, and for which they took their money ; ergo, that the defendants should now be forced in equity to pay back their money and interest, and be put into the same plight in effect as they would have been if they had broken their agreement, (*)seems hard ; and the more, because all the reasons which are used to enforce such a decree do arise either from the eviction by Mrs. Ann Moseley, or from the supposed defective and illusory performance of the agreement by the defendants, or from some other circumstance in the case which hath disabled the plaintiff to sue his bond at law ; and yet no arguments are drawn from any of these heads strong enough to support this bill. For, first, as to the eviction ; although after the bond and the agreements the lands were evicted by Mrs. Ann Moseley, so that the defendants may now seem to retain the 600*l.* for nothing, yet he that purchases lands with any other covenants or warranties against prior titles, as here, where the defendants sold only their own title, if the land be afterwards evicted by an eigne title, can never exhibit a bill in equity to have his purchase-money again, upon that account possibly there may be equity to stop the payment of such purchase-money as is behind, but never to recover what is paid ; for the Chancery mends no man's bargain, though it sometimes mends his assurance ; and it cannot be truly said that the defendants keep the money for nothing, since they have done all which was agreed to be done for it ; but if the plaintiff had bought that which falls out to be worth nothing, he can complain of none but himself."

After discussing the manner of the defendants, performance of their agreement, the reasons of Lord Nottingham proceed thus : " For whereas the plaintiff supposes

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himself disabled to go to law, in regard the defendants are not obliged to repay without a re-conveyance, which cannot now be made in regard of Ann Moseley's eviction, his Lordship conceived this to be only a pretence; for whether the title be good or bad, the plaintiff may still proceed to re-convey what was pre-conveyed, and then assign the breach in not suffering a recovery if he think (*)good. And the plaintiff might as reasonably have prayed a decree heretofore that the defendants might not perform their agreement, as pray a decree now that they may be never the better for it, if they have performed it. Wherefore, upon the whole matter, though, if the defendants had been plaintiffs for the money, his Lordship would hardly have decreed for them; as they were defendants, and in possession of money upon an agreement executed, his Lordship saw no cause to decree against them.

But yet he did not absolutely dismiss, but decreed, 1st, if plaintiff go to law, defendants to admit a re-conveyance, and not to take advantage of eviction here; 2d, if plaintiff release defendants, to make further assurance.

So where(z) A. bought an estate, to one moiety of which there was a clear defect of title, which his counsel had overlooked, and he was afterwards evicted; he filed a bill asserting his claim to be repaid a moiety of the purchase-money, although the covenants for title did not extend to the eviction, but the bill was dismissed(I).

(z) See 3 Ves. jun. 235; and see 2 Bos. & Pull. 23.

(I) In the second vol. of Coll. of Decis. p. 517, 518, a case to the same effect is reported.—Lands which were sold with the warrantice from fact and deed allenary, being evicted, but not through default of the disposer, the purchaser brought an action, not upon the warrantice, which was not incurred, but upon this ground of equity, that if he has lost the land, he ought at least to have a repetition of the price. It was

The facts of this case were as follow : William Davy (*) devised the estate in question to Sir Robert Ladbroke and Lyde Brown, as tenants in common, in fee ; and gave all the residue of his real estate to his brother William Pate in fee. Sir Robert Ladbroke died in the testator's life-time. Robert Pate, as devisee of William Pate, the residuary devisee, conceived himself to be entitled to the moiety devised to Sir Robert Ladbroke, which became lapsed by his death, in the testator's life-time(I) ; and accordingly Robert Pate joined with the persons entitled to the moiety devised to Lyde Brown, in selling the estate to one Urmston. *The conveyance recited the will of William Davy, and all the subsequent instruments*, and a covenant was inserted for the title, notwithstanding any act done by Robert Pate, or his ancestors, or any person claiming under him or them. The purchaser finding Robert Pate had no title to the moiety over which he assumed a power of disposition, but that it had descended to the heir at law of William Davy, filed his bill, praying that the purchase-money might be restored to him. Robert Pate, the vendor, demurred to the bill for want of equity, and the demurrer was allowed(a).

(a) *Urmston v. Pate*, Chan. 1st Nov. 1794, cited in 1 Trea. Eq. 364, n. and stated in 4 Cruise's Digest, 90, s. 64.

answered, that when one sells with warrandice from fact and deed, the intention is not to sell the subject absolutely, which would be the same as selling it with absolute warrandice, but only to sell it so as the seller himself has it, that is to sell what title and interest he has in the subject : the purchaser takes upon himself all other hazards ; and, therefore, if eviction happen otherwise than through the fact and deeds in the disponent, he bears the loss. The Lords assoilized. *Craig v. Hopkins*.

(I) The mistake arose from the case of lapse being considered the same in regard to real and personal estate : in the case of personal estate lapsed legacies fall into the residue ; but where a real estate lapses, it descends to the heir at law, and does not pass to the residuary devisee.

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In a case where a purchaser bought and obtained a conveyance of an estate with all defects and faults of title, and the seller upon being interrogated, stated that no rent had ever been paid, which turned out to be false, and the title being merely a leasehold the estate was recovered by the lessor; upon an action by the purchaser to recover the purchase-money, it was left to the jury to (*)say whether the seller really believed that no rent had ever been paid, in which case the learned Judge told them that the statement was not fraudulent, and he was not liable, and the jury found for the defendant. The Court refused to disturb the verdict. The statement, though false, in fact was not fraudulent. There was no distinction between an active and a passive communication, for a fraudulent concealment is as bad as a wilful misrepresentation. A fraudulent concealment by the seller of a fact which he ought to communicate, would undoubtedly vitiate the sale, but in order to have that effect the concealment must be fraudulent. The *scienter* or fraud is the gist of the action when there is *not* a warranty(b).

But it should be observed that in this case, as one of the Judges remarked, the purchaser bought the land with all faults and defects of title.

So, if a purchaser neglect to look into the title, it will be considered as his own folly, and he can have no relief. It has even been laid down, that if one sells another's estate without covenant or warranty for the enjoyment, it is at the peril of him who buys, because the thing being in the realty, he might have looked into the title, and there is no reason he should have an action by the law where he did not provide for himself(c)(262). But it may

(b) *Early v. Garrett*, 4 Mann. & Ryl. 687. As to defects in the quality of the estate, see p. 292.

(c) *Roswell v. Vaughan*, 2 Cro. 196; *Lysney v. Selvy*, 2 Lord Raym.

(262) See *Bumpus v. Platner*, Johns. Ch. Rep. 213. See also *Stockton v. Cook*, 3 Munf 68.

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here be remarked, that by the 32 H. 8, c. 9, no person must either buy or sell any pretended title unless the seller or the persons from whom he claims have been in possession of the estate, or of the reversion thereof, or taken the rents thereof for a year before the sale, unless the purchaser is in lawful possession, in which case he may buy (*) in any pretended right; and he will not in any case be affected, unless he bought with notice(c).

In a late case the statute was pleaded with effect(d). In a recent instance this statute was actually pleaded to a bill for a specific performance, on the ground that the plaintiff himself was only entitled under an agreement for purchase of the estate; but there was no foundation whatever for such a defence. It is perfectly clear that the statute does not apply to such a case. The sale is not of a pretended right or title, but of the estate in fee-simple in possession, subject certainly to the decision of a court of equity upon the right to a specific performance. There were lately similar cases in court, and one particularly of great magnitude, in which the sub-purchaser would have been happy to avail himself of any objection to get rid of the contract, but it never before occurred to any one to plead the statute. It might with equal force be argued, that a purchaser under an agreement has not a devisable interest, for it is settled, that a mere right of entry is not devisable; and this, it may be said, is "a mere pretended right or title." The clear doctrine is, that the purchaser, from the time of the contract, is in equity the owner of the estate, and may devise, sell and dispose of it in the same manner as if the fee were actually conveyed

1118; *Goodtitle v. Morgan*, 1 Term Rep. 755; and see *Anon.* 2 Freem. 106; and see and consider *Hitchcock v. Giddings*, 4 Price, 135.

(c) See 4 Rep. 26 a; Bac. Abr. tit. Maintenance, (E.)

(d) *Hitchins v. Lander*, Coop. 34.

(*561)

to him, although if equity ultimately refuse a specific performance, the devise, sale or other disposition necessarily falls to the ground. In a late case Lord Eldon reprobated the doctrine. His Lordship held clearly, that the sale of an equitable estate under a contract was binding. It was every day's practice. Upon a sale of an interest under a contract, the seller becomes a trustee (*) for the second purchaser, and the second purchaser is, without entering into a covenant, bound to indemnify him against any costs incurred in proceedings for his benefit. The Court not only considers it not unlawful, but compels him to permit his name to be used for the benefit of the second purchaser(e). This puts the point at rest.

It is not champerty in an agreement to enable the *bona fide* purchaser of an estate to recover for rent due, or injuries done to it previously to the purchase(f).

“Where a purchaser has taken a defective title, and cannot recover against his immediate vendor, his only remedy is to have recourse to the covenants of the earlier vendors, many of which are inherent to the lands, and to some of which, as the covenant for quiet enjoyment, there is no objection, on account of their antiquity, where the breach is recent(g).”

3. It seems, that if the conveyance be actually executed, the purchaser can obtain no relief, although the money be only secured.

In an early case, however(h), where *A.* had sold to *B.*, with covenants only against *A.*, and all claiming by, from, or under him; *B.* secured the purchase-money; but before

(e) *Wood v. Griffith*, 12th Feb. 1818, MS.

(f) *Williams v. Protheroe*, 5 Bing. 309; 3 Yo. & Jerv. 129.

(g) *Butler's n. (1)*. to Co. Litt. 384 a.

(h) *Anon.* 2 Cha. Ca. 19; and see *Fonbl. n. (g)* to 1 Trea. Eq. 361, 2d edition.

payment, the land was evicted by a title paramount to *A.*'s and Lord Chancellor Finch relieved from the payment of the purchase-money.

The case, it seems, was not taken by the reporter himself, and he adds the following notes or queries to it :

First. If declaration at the time of the purchase treated (*)on, that there was an agreement to extend against all incumbrances, not only special, it could not have been admitted.

Secondly. The affirmative covenant is negative to what is not affirmed, and all one as if expressly declared that the vendor was not to warrant but against himself, and the vendee to pay, because absolute without condition.

Thirdly. *Quære*. If this may not be made use of to a general inconvenience, if the vendee, having all the writings, and purchase, is weary of the bargain, or in other respects sets up a title to a stranger by collusion?

Nota. In many cases it may be easily done, &c.

These remarks are unanswerable ; and if the doctrine in this case were law, the consequences would be of a very serious nature ; for what vendor would permit part of the purchase money to remain on mortgage of the estate, if he were liable to lose it, supposing the estate to be recovered by a person against whose acts he had not covenanted ? Indeed, this point is so very differently considered in practice, that where part of the purchase-money is permitted to remain on mortgage, although the covenants from the vendor be limited, the vendee invariably enters into general unlimited covenants, in the same manner as he would have done in the case of an independent mortgage.

In a case(i) where an estate was sold before a Master under a decree, and the purchaser under the usual order had paid his purchase-money into the Bank, but it was

(i) *Thomas v. Powell*, 2 Cox, 394.

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not to be paid out without notice to him, and he took possession, and approved of the title, and the conveyance to him was executed by all necessary parties ; afterwards, but before the money was paid out of the Bank, the tenants (*) were served with a writ of right, at the suit of an adverse claimant ; it was held that the money must be applied under the decree. The Court having given the purchaser possession of the estate which he had purchased, and a conveyance under a title which he himself had previously approved, had done all it could for the purchaser, who could not afterwards object to the application of the purchase-money.

But this does not apply to a sale under the Court, where the rent is misrepresented : although the money be paid into court and possession be delivered, and a conveyance executed, yet the Court will give to the purchaser out of the funds in Court, a compensation for the misrepresentation(*k*).

4thly. Although the purchase-money has been paid, and the conveyance is executed by all the parties, yet if the defect do not appear on the face of the title-deeds, and the vendor was aware of the defect, and concealed it from the purchaser, or suppressed the instrument by which the incumbrance was created, or on the face of which it appeared, he is in every such case guilty of a fraud(*l*)(263), and the purchaser may either bring an action on the case, or file his bill in equity for relief.

But, as Mr. Butler remarks, a judgment obtained after the death of the seller, in an action of this nature, can only charge his property as a simple contract debt, and will not, therefore, except under very particular circum-

(*k*) *Cann v. Cann*, 3 Sim. 447.

(*l*) See *Harding v. Nelthorpe*, Nels. Cha. Rep. 118 ; and *Bree v. Holbech*, Dougl. 654, 2d edit. ; and see *Freem.* 2.

(263) See *Dorsey v. Jackman*, 1 Serg. & Rawle, 42. and *ante*, p. 23.

(*564)

stances, charge his real assets. A bill in Chancery, in most cases, will be found a better remedy: it will lead to a better discovery of the concealment, and the circumstances (*)attending it, and may in some cases enable the Court to create a trust in favor of the injured purchaser(*m*).

Where a bill is filed against the vendor, and the Court cannot satisfy itself of the fact, an issue will be directed to try whether the vendor did know of the incumbrance(*n*).

In a late case, where the sellers knew of a defect in the title to a part of the estate, which was material to the enjoyment of the rest, and did not disclose the fact to the purchaser, and it could not be collected from the abstract, the purchaser, although he was not evicted, was relieved against the purchase in equity. The sellers were decreed to repay the purchase-money, with costs, and likewise all expenses which the purchaser had been put to relative to the sale, together with an allowance for any money he laid out in repairs during the time he was in possession(*o*). This is a case of the first impression. But after the contract is executed by a conveyance and payment of the purchase-money, a bill cannot be filed merely for compensation(*p*).

Although the vendor has fraudulently concealed an incumbrance, yet the purchaser has no lien on the purchase-money after it is appropriated by the vendor.

(*m*) See Butler's n. (1) to Co. Litt. 34 a.

(*n*) Harding v. Nelthorpe, *ubi sup*.

(*o*) Edwards v. M'Leay, Coop. 308; affirmed by Lord Eldon on appeal, 11 July 1818, with a reservation of the question as to repairs, MS.; S. C. 2 Swanst. 287. The question upon the right to rescind is fully considered, and all the authorities cited, in Mr. Younge's Report of Small v. Attwood.

(*p*) Lenham v. May, 13 Price, 749.

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Thus, in the case of *Cator v. Earl of Pembroke*(*q*), Lord Bolingbroke was tenant for life of a settled estate, with a power to sell and lay out the money arising by sale (*) in other lands ; and in the mean time to invest the same in the funds. Lord Bolingbroke granted life-annuities out of the estate, and then he and the trustees of the settlement sold the estate to Cator, who was ignorant of the annuities, and Lord B. covenanted that Cator should enjoy free from incumbrances. The purchase-money was invested in the funds in the names of the trustees, and Lord Bolingbroke granted annuities to Boldero the banker, to the extent of the dividends ; and the trustees, at the request of Lord Bolingbroke, gave Boldero an irrevocable power of attorney to receive the dividends. Cator being evicted by the grantee of the annuities charged on the estate, filed his bill, insisting that he had a lien on the purchase-money invested in the funds, and was entitled to the dividends in exclusion of Boldero. The cause was first heard before the Lords Commissioners Loughborough, Ashurst and Hotham, who thought that Cator had a lien on the dividends, but that Boldero had a preferable equity, and therefore dismissed the bill. The cause was reheard before Lord Thurlow(*r*), who affirmed the decree, and was moreover of opinion, that Cator could not follow the money when deposited with the trustees, but that having taken a covenant for quiet enjoyment and a good title, his remedy was that way.

Where a purchaser pays part of the purchase-money generally to a creditor of the vendor, by judgment, or other security affecting the land, and also by bond, or other security, which does not affect the land, it will be considered as a payment in satisfaction of the judg-

(*q*) *Cator v. Earl of Pembroke*, 1 Bro. C. C. 301 ; and see and consider 12 Ves. jun. 356. 377.

(*r*) 2 Bro. C. C. 282.

ment, or other incumbrance which charges the estate(s)(264).

(*)It may here be observed, that if a seller is bound to relieve the estate sold from incumbrances, and the purchaser buys them up, he ought not to charge more than he paid, as that is the amount of the damage which he sustains by the breach of the covenant to pay off the incumbrances(*t*)(265).

(*s*) *Brett v. Marsh*, 1 Vern. 468. See *Hayward v. Lomax*, 1 Vern. 24 ; *Peters v. Anderson*, 5 Taunt. 596.

(*t*) 2 Dow. 296.

(264) The question agitated in these cases, was, whether the party paying money has a right to direct the appropriation. See *Robert v. Garnie*, 3 Caines, 14. *Mayor of Alexandria v. Patten*, 4 Cranch, 317. *Field v. Holland*, 6 Cranch 8.

(265) And if the purchaser agree to pay a certain sum, in discharge of an incumbrance, for which sum he is to have a credit in part of the purchase money ; and it does not appear, that the vendor deceived him with respect to the sum, for which the removal of the incumbrance could be effected, he is not to be credited for any larger sum, which the incumbrancer may have compelled him to pay. *Mayo v. Purcel*, 3 Munf. 243.

(*567)

